No. _____

# In the Supreme Court of the United States

MID-ATLANTIC MARKET DEVELOPMENT COMPANY, LLC, *et al.*,
*Petitioners*,

v.

MORAN FOODS, INC., d/b/a SAVE-A-LOT, LTD.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

ROBERT J. PALMER
*Counsel of Record*
W. TODD WOELFER
MAY · OBERFELL · LORBER
4100 EDISON LAKES PARKWAY
SUITE 100
MISHAWAKA, IN 46545
(574) 243-4100
(574) 232-9789 FAX
*Attorneys for Petitioners*

June 4, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## QUESTIONS PRESENTED

I. Did the Federal Reserve Board exceed its power to enact regulations under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, by revising a regulation, 12 C.F.R. § 202.2(e), which excluded guarantors from the definition of "applicant" to specifically include guarantors within that definition?

II. Does a violation of the Equal Credit Opportunity Act provide an affirmative defense to a victim of discrimination in an action brought to enforce an unlawful guaranty?

## RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

*Defendants-Appellees and Petitioners*: Mid-Atlantic Market Development Company, LLC, Midwest Markets, LLC, Roger V.S. Camp and Susan Camp.

*Plaintiff-Appellant and Respondent*: Moran Foods, Inc. d/b/a Save A Lot, Ltd.

## RULE 29.6 DISCLOSURE STATEMENT

Midwest Markets, LLC is a wholly owned subsidiary of Mid-Atlantic Market Development Company, LLC.

There is no publicly-held company owning 10% or more of the stock of either Mid Atlantic Market Development Company, LLC or Midwest Markets, LLC.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . i

RULE 14.1(b) STATEMENT . . . . . ii

RULE 29.6 DISCLOSURE STATEMENT . . . . . iii

TABLE OF CONTENTS . . . . . iv

TABLE OF AUTHORITIES . . . . . vii

PETITION FOR A WRIT OF CERTIORARI . . . . . 1

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

STATUTORY PROVISIONS INVOLVED . . . . . 2

STATEMENT OF THE CASE . . . . . 2

REASONS FOR GRANTING THE PETITION . . . . . 5

ARGUMENT . . . . . 6

I. THE SEVENTH CIRCUIT'S OPINION THAT THE ECOA CANNOT BE "STRETCHED FAR ENOUGH" TO ALLOW THE FEDERAL RESERVE BOARD TO INCLUDE GUARANTORS WITHIN THE DEFINITION OF "APPLICANT" CREATES A CONFLICT WITH ALL PRIOR REPORTED FEDERAL

CASES WHICH HAVE GIVEN EFFECT TO THE REVISED REGULATION . . . . . 6

II. THE DISTRICT COURT'S RULING THAT A VIOLATION OF THE ECOA CAN ONLY BE RAISED AS A COUNTERCLAIM AND NOT AS AN AFFIRMATIVE DEFENSE HIGHLIGHTS A CONFLICT AMONG FEDERAL COURTS . . . . . 14

CONCLUSION . . . . . 18

APPENDIX

Appendix A: March 5, 2007, Order of the United States Court of Appeals for the Seventh Circuit . . . . 1a

Appendix B: February 5, 2007, Decision of the United States Court of Appeals for the Seventh Circuit . . . . . 2a

Appendix C: August 2, 2005, Opinion and Order of the United States District Court, Northern District of Indiana, South Bend Division . . . . . 13a

Appendix D: January 31, 2005, Memorandum and Order of the United States District Court, Northern District of Indiana, South Bend Division . . . . . 16a

Appendix E: April 26, 2002, Memorandum and Order United States District Court, Northern District of Indiana, South Bend Division . . . . . 25a

Appendix F: Statutes and Regulations . . . . . 82a

15 U.S.C.S. § 1691(a)(1) . . . . . 82a

12 C.F.R. § 202.2(e) . . . . . 82a

12 C.F.R. § 202.7(d) . . . . . 83a

## TABLE OF AUTHORITIES

### Cases

*Anderson v. United Finance Co.*,
666 F.2d 1274 (9th Cir. 1982) . . . . . 7, 9

*BayBank v. Bornhofft*,
694 N.E.2d 854 (Mass. 1998) . . . . . 7

*Cadle Co. v. Vargas*,
771 N.E.2d 179 (Mass. App. 2002) . . . . . 7

*Douglas County National Bank v. Pfeiff*,
809 P.2d 1100 (Colo. App. 1991) . . . . . 7

*F.D.I.C. v. Medmark, Inc.*,
897 F.Supp. 511 (D. Kan. 1995) . . . . . 7, 17

*Hammons v. Ehney*,
924 S.W.2d 843 (Mo. 1996) . . . . . 7

*In re Farris*, 194 B.R. 931 (E.D. Pa. 1996) . . . . . 17

*Integra Bank/Pittsburgh v. Bremen*,
839 F.Supp. 326 (E.D. Pa. 1993) . . . . . 7, 15, 16, 17

*Riggs National Bank of Washington, D.C. v. Linch*,
36 F.3d 370 (4th Cir. 1994) . . . . . 8, 9, 10

*Silverman v. Eastrich Multiple Investor Fund, L.P.*,
51 F.3d 28 (3rd Cir. 1995) . . . . . 6, 7, 8, 15, 17

*Southwestern Pennsylvania Regional Council, Inc. v. Gentile*,
776 A.2d 276 (Pa. Super., 2001) . . . . . 7

*Stern v. Espirito Santo Bank of Florida*,
791 F.Supp. 865 (S.D. Fla. 1992) . . . . . 7

*Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004) . . . . 7

*Stornawaye Properties, Inc. v. Moses*,
76 F.Supp.2d 607 (E.D. Pa. 1999) . . . . . 7, 17

*United States v. Meadors*,
753 F.2d 590 (7th Cir. 1985) . . . . . 18

**Regulations, Statutes and Rules**

12 C.F.R. § 202.2 . . . . . 6

12 C.F.R. § 202.2(e) . . . . . 2, 5

12 C.F.R. § 202.7(d) . . . . . 2, 8

12 C.F.R. § 202.7(d)(1) . . . . . 10

15 U.S.C. § 1691 . . . . . 2, 5, 9

15 U.S.C. § 1691(a) . . . . . 9

15 U.S.C. § 1691(a)(1) . . . . . 2

15 U.S.C. § 1691e(c) . . . . . 16

28 U.S.C. § 1254(1) . . . . . 1

28 U.S.C. § 2101(c) . . . . . 1

Sup. Ct. R. 13.1 . . . . . 1

## PETITION FOR A WRIT OF CERTIORARI

Mid-Atlantic Market Development Company, LLC, Midwest Markets, LLC, Roger V.S. Camp and Susan Camp respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated February 5, 2007, is officially reported at 476 F.3d 436, and is reproduced at App. B, 2a-12a. The memorandum opinion and order of the United States District Court for the Northern District of Indiana, South Bend Division, dated August 2, 2005, is unofficially reported at 2005WL2136363 and is reproduced at App. B, 13a-15a. The district court's memorandum and order, dated April 26, 2002, limiting Susan Camp's Equal Credit Opportunity Act claims to a counterclaim for recoupment instead of an affirmative defense is unreported and is reproduced at App. E, 25a-81a.

## JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was entered on February 5, 2007. A timely-filed petition for rehearing was denied on March 5, 2007. App. A, 1a. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within ninety (90) days after the denial of the petition for rehearing. This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 15 U.S.C. § 1691(a)(1), 12 C.F.R. § 202.2(e), and 12 C.F.R. § 202.7(d). The relevant statutory provisions are reproduced at App. F, 82a-83a.

## STATEMENT OF THE CASE

This petition arises from an action filed by Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. ("SAL") seeking damages against Mid-Atlantic Market Development Company, LLC and Midwest Markets, LLC ("Companies") arising out of contracts between the parties. Mid-Atlantic Markets, LLC was added as a defendant in an amended complaint. Roger and Susan Camp were included as defendants based on personal guaranties signed by the Camps.

The defendants filed an answer and counterclaim to SAL's amended complaint. The Companies asserted in the counterclaim, *inter alia*, that SAL breached the contract by failing to provide accounting services as specified by the contract. Susan Camp filed a counterclaim alleging that SAL violated the Equal Credit Opportunity Act, 15 U.S.C. § 1691, by requiring her to sign a personal guaranty based on her status as Roger Camp's wife.

The district court granted in part SAL's motion for partial summary judgment on its claims. The court determined that damages, including prejudgment interest at the rate of twenty-two percent (22%) per annum as specified in the contracts, totaled Two Million Two Hundred Sixty-Nine Thousand Six Hundred Fifty-Two Dollars and Seventy-Six Cents ($2,269,652.76).

The case proceeded to a jury trial on two of the counterclaims, breach of contract and violation of the ECOA. The jury returned a verdict in favor of the Companies on the breach of contract claim in the amount of Three Million Six Thousand Three Hundred Fourteen Dollars ($3,006,314.00) and in favor of Susan Camp on the ECOA claim in the amount of Fifty Thousand Dollars ($50,000.00). More than one year later, the district court issued a memorandum and order entering judgment in which it determined that the jury verdict in favor of the Companies acted as a complete setoff of the original judgment in favor of SAL and ordered that neither SAL, nor the Companies, owed anything to the other. The court also awarded Susan Twenty-One Thousand Four Hundred Twenty-Eight Dollars and Fifty-Seven Cents ($21,428.57) representing three-sevenths (3/7) of the amount awarded by the jury because four of the seven guaranties at issue were signed beyond the applicable statute of limitations.

SAL filed a motion for judgment as a matter of law or, in the alternative, for a new trial. The district court, among other rulings, held that the evidence was sufficient to support the jury's verdict in favor of both the Companies. App. 15a.

SAL appealed to the United States Circuit Court for the Seventh Circuit. Among the issues raised were the sufficiency of the evidence to support the award in favor of the Companies and whether Susan Camp was an "aggrieved applicant" under the ECOA. In addition to responding to those arguments in the appellees' brief, Susan Camp also asserted that SAL waived any challenge to the ECOA judgment because it was not identified in SAL's notice of appeal. Susan also filed a cross-appeal asserting that the district court erred in ruling that her ECOA claims must be raised as a counterclaim for recoupment, and not as an affirmative defense to the action on the guaranty. Susan also

asserted that the district court erred in limiting evidence of her damages, specifically omitting evidence of the underlying judgment against Susan as evidence of damages.

The Seventh Circuit Court of Appeals reversed the judgment in favor of the Companies and remanded to the district court to enter judgment in favor of SAL on the counterclaim for breach of contract on the basis that the evidence did not support the judgment amount. The Court mandated that judgment be entered in favor of SAL despite the fact that SAL conceded that it breached the contract and, further, that the undisputed evidence established damages other than those awarded by the jury.

With respect to the ECOA claims, the Court doubted that the statute "can be stretched far enough to allow" the Federal Reserve Board's definition of "applicant" to include a guarantor. App. 10a. The Court noted that: "There is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor." App. 10a. The Court further noted that the Federal Reserve Board's regulatory definition of "applicant" as including a guarantor: "opens vistas of liability that the Congress that enacted the act would have been unlikely to accept." App. 10a. As an alternative basis for the Court's reversal of Susan's ECOA claim, the Seventh Circuit ruled that despite undisputed evidence that at the time of the application, Roger, as an applicant and guarantor, was determined by SAL to be fully creditworthy and that Susan was required to sign only as a matter of company policy, Susan failed to prove discrimination because: "sound commercial practice unrelated to any stereotypical view of a wife's role for [SAL] to require that she guaranty the debt along with her husband." App. 12a.

## REASONS FOR GRANTING THE PETITION

In enacting 15 U.S.C. § 1691, Congress made it unlawful for any creditor to, among other things, discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age. The Federal Reserve Board promulgated regulations which originally defined "applicant" as excluding guarantors. 12 C.F.R. § 202.2(e)(1985). In 1985, the Federal Reserve Board revised the regulation to include guarantors within the definition of "applicant." This Court has never addressed the Federal Reserve Board's power to define "applicant" as including guarantors. The Seventh Circuit opinion is the first reported case calling into doubt the Federal Reserve Board's power to do so and creates a conflict with other federal courts which have unanimously included guarantors within the definition of "applicant" under the revised regulation.

This Court should grant certiorari to confirm the Federal Reserve Board's power to revise its own regulation to include guarantors within the definition of applicant after initially excluding guarantors. This would resolve a conflict between the Seventh Circuit opinion in the instant case and prior federal court opinions.

The district court ruled that Susan's ECOA claims could be raised only as counterclaims, and not affirmative defenses to SAL's action on the guaranties. This ruling highlights an ongoing conflict between federal courts regarding the effect of an illegal guaranty under the ECOA. Although the Seventh Circuit failed to address Susan's argument that a violation of the ECOA should be treated as an affirmative defense, or at least render any illegal guaranty invalid, a conflict between

the district court's opinion and other federal case law nevertheless exists.

This Court should grant certiorari to resolve the conflict regarding whether a violation of the ECOA can be raised as an affirmative defense to the enforcement of a judgment on an illegal guaranty or is limited to a counterclaim for specified damages.

## ARGUMENT

### I. THE SEVENTH CIRCUIT'S OPINION THAT THE ECOA CANNOT BE "STRETCHED FAR ENOUGH" TO ALLOW THE FEDERAL RESERVE BOARD TO INCLUDE GUARANTORS WITHIN THE DEFINITION OF "APPLICANT" CREATES A CONFLICT WITH ALL PRIOR REPORTED FEDERAL CASES WHICH HAVE GIVEN EFFECT TO THE REVISED REGULATION.

Although the Seventh Circuit stopped short of explicitly ruling that the Federal Reserve Board exceeded its authority in including guarantors within the definition of "applicant," the Court did state that it doubted: "that the statute could be stretched far enough to allow this interpretation." App. 10a. The Court also noted that: "There is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor.' App. 10a. These statements by the Court are not only contrary to 12 C.F.R. § 202.2, they also conflict with the Ninth Circuit Court of Appeals' decision in *Silverman v.*

*Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995).[1]

The Seventh Circuit's opinion cites no case, federal or state, which has ruled that the Federal Reserve Board exceeded its authority in including guarantors within the definition of "applicant." In fact, the Court has set itself apart from the numerous federal and state cases which have given effect to the revised regulation. *See, e.g.*, *Stornawaye Properties, Inc. v. Moses*, 76 F.Supp.2d 607 (E.D. Pa. 1999); *F.D.I.C. v. Medmark, Inc.*, 897 F.Supp. 511 (D. Kan. 1995); *Integra Bank/Pittsburgh v. Freeman*, 839 F.Supp. 326 (E.D. Pa. 1993); *Stern v. Espirito Santo Bank of Florida*, 791 F.Supp. 865 (S.D. Fla. 1992); *Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004); *Cadle Co. v. Vargas*, 771 N.E.2d 179 (Mass. App. 2002); *Southwestern Pennsylvania Regional Council, Inc. v. Gentile*, 776 A.2d 276 (Pa. Super., 2001); *BayBank v. Bornhofft*, 694 N.E.2d 854 (Mass. 1998); *Hammons v. Ehney*, 924 S.W.2d 843 (Mo. 1996); *Douglas County National Bank v. Pfeiff*, 809 P.2d 1100 (Colo. App. 1991). Neither the Seventh Circuit, nor SAL, has cited any authority for the proposition that guarantors are not properly contained within the definition of "applicant" under the Federal Reserve Board's regulations.

---

[1] The Seventh Circuit opinion cites *Anderson v. United Finance Co.*, 666 F.2d 1274, 1276-77 (9th Cir. 1982) as a case which "assumes the validity of the regulation without discussion of the point." App. 10a. *Anderson*, however, involved neither a guarantor nor the inclusion of a guarantor within the definition of "applicant." The Federal Reserve Board's revised regulation which included guarantors within the definition of "applicant" did not become effective until October 1, 1986, more than four and one-half years after the decision in *Anderson*.

To the extent that the Seventh Circuit's opinion does not create an explicit conflict with *Silverman* because the Court also based its reversal of the ECOA judgment on a factual determination of lack of discrimination, that determination conflicts with the definition of "discrimination" as defined by 12 C.F.R. § 202.7(d) and as interpreted by the Fourth Circuit Court of Appeals in *Riggs National Bank of Washington, D.C. v. Lynch*, 36 F.3d 370 (4th Cir. 1994). In this regard, the Seventh Circuit did not define "discrimination" in ruling that there was no evidence that SAL discriminated against Susan. However, in the context of the Equal Credit Opportunity Act, the relevant section of regulations defining discrimination is 12 C.F.R. § 202.7(d). The regulation states in relevant part:

> (d) Signature of spouse or other person –
>
> > (1) Rule for qualified applicant. Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.
> >
> > * * *
> >
> > (4) Secured credit. If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien,

> pass clear title, waive inchoate rights, or assign earnings.

This regulation has been interpreted by the Fourth Circuit Court of Appeals as requiring a lender to make a determination of the creditworthiness of the applicant before requiring a spouse to sign a guaranty. In *Riggs National Bank of Washington, D.C. v. Linch*, 36 F.3d 370 (4th Cir. 1994), the Court stated:

> Appellants next contend that the district court erred in concluding that Riggs did not violate the ECOA by requiring Marcia Linch to execute a personal guaranty of the note. More specifically, appellants argue that it was error for the district court to find that Riggs required Marcia Linch to be a guarantor only *after* it had determined that Samuel Linch was not independently creditworthy for the amount of the loan involved. After a review of the evidence of record below, we find no error.
>
> It is well-established that the ECOA, 15 U.S.C. § 1691 *et seq.*, and its implementing regulations, 12 C.F.R. § 202.1 *et seq.*, prohibit a creditor from requiring a spouse's signature on a note when the applicant individually qualifies for the requested credit. *See, e.g., Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982). Specifically, the ECOA provides that it 'shall be unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction, . . . on the basis of . . . marital status . . . .' 15 U.S.C. § 1691(a). The regulations implementing the ECOA further provide that 'a creditor shall not require the signature of an applicant's spouse . . . , other than a

> joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount in terms of the credit requested' 12 C.F.R. § 202.7(d)(1).
>
> In applying these provisions to the facts of record here, the district court properly recognized that the determinative factual issue was whether Riggs had made a determination that Samuel Linch was not independently creditworthy for the requested loan before it required that Marcia Linch also be a personal guarantor of the loan. After hearing testimony and receiving evidence at the trial, the district court found as a fact that Riggs did not require Marcia Linch to be an additional guarantor until *after* it had learned that Samuel Linch did not individually own many of the substantial assets which he had listed on the 'personal' financial statement submitted by him to Riggs with the original loan application. There is little doubt that Samuel Linch failed to inform Riggs that many of the assets listed in his personal financial statement were jointly owned by him and his wife. The district court further found that Riggs had properly made a contemporaneous determination that Samuel Linch was not independently creditworthy for the amount of the requested loan, and that it was only after this determination was made that Riggs requested that Marcia Linch also be a guarantor of the loan.

36 F.3d at 374.

Unlike the situation in *Riggs*, the evidence most favorable to the prevailing party in the present case establishes that SAL required Susan to sign the guaranty only because it was SAL's policy to require spousal guaranties. The evidence most

favorable to the prevailing party further establishes that not only did SAL never make a determination that Roger was not independently creditworthy, SAL, in fact, assumed that Roger was creditworthy.

Furthermore, contrary to the Seventh Circuit's ruling, the evidence most favorable to the judgment establishes that SAL did not rely on any financial statements involving joint assets. SAL's representative, Joe Higgs, then the Chief Financial Officer of SAL, testified that when he received the financial statement from Roger, he did not investigate it to any large degree. Higgs, at that time, had the understanding that Roger "had the wherewithal to purchase an existing independent store" because he had been in the grocery business before and had owned stores. When Higgs received the financial statement from Roger, he assumed that Roger had the wherewithal to own and operate the stores.

SAL never requested a financial statement from Susan. The title of the document provided to SAL by Roger indicated that it was the financial statement of "Roger V. S. Camp." The financial statement did not identify any property as jointly held.

Higgs contacted Roger after receiving the financial statement and made a joke of the fact that the numbers were added incorrectly. Higgs, however, did not ask Roger any questions about the financial statement or anything about Susan's financial condition. Higgs did not ask Roger to submit a financial statement on behalf of his wife. Additionally, Higgs did not ask if any of the assets on Roger's financial statement were jointly-held assets.

No one from SAL inquired of Roger whether any of the assets on the financial statement were jointly held or owned

by him individually. No one from SAL ever contacted Roger about financial statements. The financial statements have never been discussed since they were submitted. No one from SAL told Roger that his financial statements were not sufficient to meet its credit standards. SAL, in fact, informed Roger that his financial condition was sufficient.

The testimony of SAL's representative, Higgs, establishes that the Seventh Circuit erred in ruling that there was no evidence of discrimination. SAL discriminated against Susan by requiring her to sign a guaranty on behalf of her husband despite failing to make a determination that Roger alone was not creditworthy. Because Higgs' testimony is conclusive on the issue given the lower court's standard of review, it is quoted below.

> Q. Okay. When you received the financial statement, did you call Roger Camp with any questions?
>
> A. No, sir.
>
> Q. And it's true, isn't it, that in regards to Roger Camp's financial statement, the one you have just looked at, you didn't investigate it to any large degree?
>
> A. No, I did not.
>
> Q. And you did that because your understanding at the time you received it was that Roger Camp had the wherewithal to purchase an existing independent store and that because he had been in the grocery business before and had owned stores that you had concluded that he had the wherewithal to operate a Save-A-Lot store?

A. Yes, that's basically correct.

Like I said, he had already negotiated with this independent retail Save-A-Lot store operator to purchase his store. Apparently, that operator had agreed to the purchase and sale. When I received the documents, that's exactly my assumption, that he had clearly the financial wherewithal to purchase the store and operate it. And, again, I depended on our operational people to tell me that he had been in the grocery business and from an operational standpoint would not have a problem with operating the store.

* * *

Q. Your normal practice in your job, Mr. Higgs, was to ask for a spousal guaranty; isn't that true?

A. Yes.

The Seventh Circuit's opinion noted that: "In fact some $2.5 million of the $8.2 million in assets listed on Mr. Camp's credit application were actually owned by Mrs. Camp." App. 11a-12a. Higgs' testimony, however, establishes that despite the Seventh Circuit's observation, Roger nevertheless was creditworthy under SAL's standards. In this regard, Higgs testified that in the late 1990's, he would feel uncomfortable approving someone with "probably under a half a million dollars in net worth." Roger clearly had far more than the minimum amount required by Higgs and SAL.

The Seventh Circuit's opinion contains a discussion of the reasonable business practices of a lender when presented with a financial statement that includes residences. App. 12a.

Regardless of what reasonable business practices might entail, the fact of the matter is in the present case, SAL did not rely on the financial statements in entering the agreements with Mid-Atlantic nor did it investigate the financial statements. Instead, SAL assumed that Roger alone had the wherewithal to own and operate the grocery stores. SAL never made a determination that Roger was not creditworthy in an individual capacity. Absent such a determination, SAL violated the ECOA by requiring Susan to sign the guaranties.

## II. THE DISTRICT COURT'S RULING THAT A VIOLATION OF THE ECOA CAN ONLY BE RAISED AS A COUNTERCLAIM AND NOT AS AN AFFIRMATIVE DEFENSE HIGHLIGHTS A CONFLICT AMONG FEDERAL COURTS.

There is no dispute that federal courts are split on the issue of whether the ECOA provides a guarantor an affirmative defense to the guaranty if it was obtained in violation of the statute. As noted by the district court in its April 26, 2002 order rejecting the ECOA as an affirmative defense, the issue is of "fairly recent vintage." App. 42a. Under the Federal Reserve Board's original regulations, guarantors were not included within the definition of "applicant." Consequently, the typical situation in which the ECOA came into play involved an applicant who was denied credit. In such cases, the applicant would never be sued by a creditor because the applicant did not obtain credit. There would, therefore, be no need to raise the ECOA as an affirmative defense. This situation was described by the district court as follows:

> Whether the ECOA constitutes a counterclaim or affirmative defense appears to arise from the 1986 promulgation of Regulation B. It would seem a rare

> scenario in which an 'applicant,' in the true sense of the word and as originally interpreted before 1986, would need to assert the ECOA as an affirmative defense. If the applicant were discriminatorily denied credit – the originally intended protection – the applicant would simply sue and would never be sued because she never received money in the first place to cause the creditor to sue. If the applicant were extended credit, but only with a guarantor's signature, the applicant obtained what she wanted and what the ECOA protects, and the ECOA violation would thus serve (in some eyes) to invalidate only the guarantor's, never the applicant's obligation. *See, e.g., Integra Bank/Pittsburgh v. Freeman*, 839 F.Supp. 326, 329-330 (E.D. Pa. 1993). In either case, the applicant has no need of the ECOA as an affirmative defense, and the issue seems only to come up with respect to guarantors.

App. 42a. The court's analysis essentially ignores the Federal Reserve Board's subsequent amendment to Regulation B which added guarantors to the definition of "applicant." The proper analysis requires the court to take into account that amendment.

The only reported case on the issue from a federal circuit court of appeals is *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995). The Third Circuit there reversed a determination that the ECOA cannot be used defensively. Instead, the Court ruled that a guarantor may raise the ECOA as a defense when a creditor attempts to collect on the guaranty which was executed in violation of the statute. In ruling that such an interpretation of the statute was in accord with the legislature's intent to curtail discrimination, the Court stated:

> Although the *Integra [Bank v. Freeman*, 839 F.Supp. 326 (E.D. Pa. 1993)] court noted that some courts have refused to grant relief from obligations under an unlawful credit instrument, we find the court's analysis of the ECOA persuasive:
>
> > Congress – in enacting the ECOA – intended that creditors not affirmatively benefit from proscribed acts of credit discrimination. To permit creditors – especially sophisticated credit institutions – to affirmatively benefit by disregarding the requirements of the ECOA would seriously undermine the congressional intent to eradicate gender and marital status based credit discrimination.
>
> *Integra*, 839 F.Supp. at 329. This interpretation of the statute best forwards its purposes, particularly in light of the inclusion of a broad remedial provision, § 1691e(c), in the ECOA. Furthermore, as the *Integra* court observed, '[t]his rule places a creditor in no worse position than if it had adhered to the law when the credit transaction occurred. A creditor may not claim to have relied factually upon a guarantor's assets if it has never requested nor received financial information regarding them. Furthermore, a creditor may not claim legal reliance on a signature that was illegally required in the first instance.' *Id.* at 329. (Footnote omitted.)

51 F.3d at 32-33. The "broad remedial provision" referred to by the Court, 15 U.S.C. § 1691e(c) provides in relevant part: "[u]pon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as

is necessary to enforce the requirements imposed under this subchapter."

The district court was concerned about the effect of a rule allowing the ECOA to be raised as affirmative defense would have on the underlying debt. App. 48a. The district court failed to recognize, however, that the underlying debt is not affected by the invalidation of an unlawful guaranty. The underlying debt, and any legally obtained guaranties, remain in effect. The Third Circuit noted as much in *Silverman*:

> If Atlantic did in fact violate the ECOA, then plaintiff may have a valid defense and obtain relief from her obligations in the guaranty. We note however that if plaintiff's guaranty is voided, this would not void the underlying debt obligation nor any other guaranties. *See Id.* [*Integra*, 839 F.Supp. at 329] ('[W]hile an ECOA violation should not void the underlying credit transaction[,] an offending creditor should not be permitted to look for payment to parties who, but for the ECOA violation, would not have incurred personal liability on the underlying debt in the first instance').

51 F.3d at 33.

Although *Silverman* is the only federal appellate case specifically addressing the issue, several district courts have reached the same conclusion. *See, e.g. Stornawaye Properties, Inc. v. Moses*, 76 F.Supp.2d 607, 613-614 (E.D. Pa. 1999); *F.D.I.C. v. Medmark, Inc.*, 897 F.Supp. 511, 514 (D. Kansas 1995); *Integra Bank/Pittsburgh v. Bremen*, 839 F.Supp. 326, 329-330 (E.D. Pa. 1993); *In re Farris*, 194 B.R. 931, 936 (E.D. Pa. 1996). The Seventh Circuit, although not discussing the issue in detail, also noted that the ECOA

was a defense in *United States v. Meadors*, 753 F.2d 590, 593 (7th Cir. 1985).

The district court's opinion notes a conflict between federal courts on whether a violation of the ECOA can be raised as an affirmative defense to an action on a guaranty. That conflict was not addressed by the Seventh Circuit opinion. This Court should grant this petition to resolve that conflict.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Robert J. Palmer
*Counsel of Record*
W. Todd Woelfer
**MAY • OBERFELL • LORBER**
4100 Edison Lakes Parkway, Suite 100
Mishawaka, IN 46545
Phone: (574) 243-4100
Fax: (574) 232-9789

*Counsel for Petitioners*

June 4, 2007

---

## APPENDIX A

---

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

**Nos. 05-3656, 05-3735**

**[Filed March 5, 2007]**

| | |
|---|---|
| MORAN FOODS, INC., | ) |
| Plaintiff-Appellant / Cross-Appellee, | ) |
| | ) |
| v. | ) |
| | ) |
| MID-ATLANTIC MARKET DEVELOPMENT COMPANY, LLC, et al., | ) |
| Defendants-Appellees / Cross-Appellants. | ) |
| | ) |

JUDGES: Before Hon. William J. Bauer, Circuit Judge, Hon. Richard A. Posner, Circuit Judge, Hon. Joel M. Flaum, Circuit Judge.

**ORDER**

The defendants-appellees/cross-appellants filed a petition for rehearing on February 20, 2007. All the judges on the panel have voted to deny the petition. It is therefore **DENIED.**

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE SEVENTH CIRCUIT

**Nos. 05-3656, 05-3735**

**[Filed February 5, 2007]**

MORAN FOODS, INC.,
Plaintiff-Appellant/ Cross-Appellee,

v.

MID-ATLANTIC MARKET DEVELOPMENT COMPANY, LLC, et al.,
Defendants-Appellees/ Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 00 C 227--Robert L. Miller, Jr., *Chief Judge*.

Before BAUER, POSNER, and FLAUM, Circuit Judges.

POSNER, *Circuit Judge*. This is a complicated diversity suit with a federal-law counterclaim. We shall simplify ruthlessly. Moran Foods franchises grocery stores under the name "Save-A-Lot" and sells the stores many of the groceries they need. Mid-Atlantic (and an affiliate that we'll ignore) was one of the franchisees. Mid-Atlantic's stores faltered, and eventually defaulted, leaving it owing Moran a considerable

amount of money for groceries bought but not paid for. Mid-Atlantic later declared bankruptcy. Roger Camp, the owner of Mid-Atlantic, and his wife, Susan Camp, had guaranteed the company's debts to Moran. (The various contracts recite that they are governed by Missouri law.) When they refused to honor their guaranties, Moran brought this suit for breach of contract against the two Camps plus Mid-Atlantic. Mid-Atlantic and Susan Camp counterclaimed. Mid-Atlantic claimed that Moran had violated a provision of their contract that required Moran to furnish certain accounting services to Mid-Atlantic. Susan Camp claimed that Moran had violated the Equal Credit Opportunity Act, which so far as relates to this case forbids "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction. . . on the basis of. . . marital status." 15 U.S.C. § 1691(a)(1).

The district judge granted summary judgment to Moran on its breach of contract claim and awarded it damages of $3,006,314 ($1.3 million for the unpaid groceries and the rest for interest at the 22 percent annual rate specified in the contract). The counterclaims were then tried to a jury, which awarded Mid-Atlantic the identical $3,006,314 on its breach of contract claim and (as corrected by the district judge) Susan Camp $21,428.57. Since the award to Mid-Atlantic canceled the debts on which Moran had based its suit, and with it Susan Camp's guaranty of that indebtedness, her damages were limited to guaranties of three debts that Moran might still try to collect because their collection was not yet barred by the judgment in this case or by the statute of limitations. The defendants' cross-appeal challenges the grant of summary judgment to Moran on its breach of contract claim and also asks that Susan Camp be awarded the attorney's fees that she incurred in litigating her claim under

the Equal Credit Opportunity Act, plus additional relief under the Act.

Mid-Atlantic's argument that it did not break its contract with Moran, and its argument that Moran's breach entitled Mid-Atlantic to damages exactly equal in amount to the damages that the district judge awarded Moran for Mid-Atlantic's breach, come to the same thing. Essentially Mid-Atlantic is arguing that had it not been for Moran's breach (which by the way is conceded), it would not have run up any debt to Moran. Moran's breach consisted of its unexcused failure to furnish Mid-Atlantic with profit and loss statements for the franchised stores for the last three quarters of 1998. For a fee of $45 a week, Moran had agreed to monitor the financial condition of each of the stores and advise Mid-Atlantic every quarter of their condition. In the last three quarters of 1998 that condition was bad. Mid-Atlantic contends that had it been advised of the parlous state of its stores it would have taken steps to mitigate its losses by changing management or product mix, selling the stores or simply closing them, and as a result it either would have had greater revenues or would have stopped buying groceries from Moran altogether and either way it would have avoided incurring the $1.3 million debt for unpaid groceries and thus the interest on that debt as well.

The problem with this argument is that Mid-Atlantic failed to present any evidence that would have enabled the jury to quantify the loss the company incurred as a result of Moran's failure to provide the three quarterly financial reports. Not that such evidence couldn't have been presented; it just wasn't. It is plausible that had Roger Camp realized how badly the stores were doing, he would have taken steps to cut his losses, and the steps might have been effective--and maybe it was too late to take them nine months later, when he at last

discovered the extent of the losses. We are not much impressed by Moran's argument that Camp's opening several additional Save-A-Lot stores after he learned the true condition of the existing ones severs any possible causal connection between Moran's breach and Mid-Atlantic's running up a large debt to Moran. The new stores may have been in better locations and therefore could reasonably have been expected to do better than the existing stores--in fact they did do better, though not by enough to offset the losses on the existing stores, losses that eventually drove Mid-Atlantic under. But all this is speculation. For Mid-Atlantic to be entitled to damages for Moran's breach, it had to present evidence from which a reasonable jury could estimate with reasonable objectivity the loss that the breach inflicted.

Mid-Atlantic should have proceeded in two steps. The first would have been to present evidence of when the missing quarterly reports, if received, would have induced Mid-Atlantic to take actions designed to minimize the losses that the reports revealed. It is not obvious that the first report, showing bad results for the first quarter of 1998, would have precipitated drastic action; but it might have. (The reactions of other Moran franchisees who receive bad news about their financial performance in one quarter would have been helpful evidence on this question.) Suppose the first report *would* have caused Mid-Atlantic to take action. If so, the second step in proving damages would then have been for Mid-Atlantic to present evidence of the costs and benefits of the most effective action that it could have taken, such as altering management or product mix or selling or closing the stores. Each of those efforts at mitigation of loss would have cost something; and then the question would be how quickly a given effort would have produced a reduction in the stores' costs and how great the reduction would have been. Conceivably the early warning provided by the quarterly reports, had Mid-Atlantic

received them, would have enabled it to cut its losses so rapidly and deeply that rather than trying and failing to recoup by opening additional stores, it would have kept current with its obligations to Moran. But there is no evidence to firm up such a conjecture.

In any event it is doubtful that such evidence would have justified damages measured by the debt that Mid-Atlantic incurred to Moran as a result of the failure of the stores. There is a "for want of a nail the kingdom was lost" flavor to Mid-Atlantic's theory of damages. The company's ultimate demise is not plausibly attributable solely to a nine-month delay in the receipt of quarterly profit and loss statements. And only the first statement was delayed nine months; the other two were delayed six and three months respectively. Roger Camp was an experienced operator of grocery stores and surely knew that his Save-A-Lot stores were not doing well, even if he didn't know the details. Knowing that the stores were losing money, he was irresponsible in allowing months to pass without wondering where the quarterly reports were. His lassitude undermines his contention that time was of the essence in avoiding a mounting debt to Moran.

It is hard to believe that for $45 a week Mid-Atlantic had bought an insurance policy, with no cap, against its business losses, however careless the insured was in letting them mount up. Of course there was no formal insurance policy, but because liability for breach of contract is a form of strict liability, a promisor is in effect a guarantor of performance even if he is unable and not merely unwilling to perform his contractual obligations. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389-90 (7th Cir. 2002); *United States v. Blankenship*, 382 F.3d 1110, 1133-34 (11th Cir. 2004); *see* Oliver Wendell Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 457, 462 (1897). This gives an

insurance dimension to many contracts. *Winniczek v. Nagelberg*, 394 F.3d 505, 508-09 (7th Cir. 2005).

Generally—to continue with the insurance analogy (contract as insurance)—the lower the insurance premium the narrower the coverage of the policy. Of course there are some very one-sided contracts, but one thing that a court can look at in determining the scope of any contract, when that scope is unclear from the contractual language, is whether it seems commensurate with the consideration paid by the party seeking to enforce the contract. *Rhone-Poulenc Inc. v. International Ins. Co.*, 71 F.3d 1299, 1303 (7th Cir. 1995); *In re Kazmierczak*, 24 F.3d 1020, 1022 (7th Cir. 1994).

Also helpful in interpreting insurance contracts, including noninsurance contracts that have an insurance dimension, is the notion of "moral hazard." That is the tendency to carelessness if you're fully insured (or, worse, overinsured). *Phelps Dodge Corp. v. Schumacher Electric Corp.*, 415 F.3d 665, 668 (7th Cir. 2005); *Federal Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 415 F.3d 487, 498-99 (6th Cir. 2005). It's why an insurer will not insure your house against fire for more than it's worth, and why an insured has a duty to mitigate his losses, though it is a "duty" not in the sense of giving rise to damages for its breach but only in the sense of being a precondition to the insured's being able to recover all his losses from the insurance company.

The duty may be stated explicitly in the contract, as in *Witcher Construction Co. v. Saint Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1, 7-8 (Minn. App. 1996), or may be imposed by the court as a "common law duty," 12 *Couch on Insurance* § 178:10 (3d ed. 2005), though in the latter case it is more precisely described as a duty that courts read into every contract. It is the duty laid on one party to a contract

not to take advantage of the other during the performance stage should circumstances deliver the latter into the power of the former, as often happens when the performance of the parties is not simultaneous. Parties can be expected to agree to such a duty—the duty of "good faith" in contractual performance, *e.g., Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992)--explicitly if they think of it. The expectation is firm enough to justify the courts in trying to save the parties the bother by imputing the duty in every contract, thus economizing on the costs of negotiating and drafting contracts without infringing freedom of contract.

The duty to mitigate damages is such a duty. It forbids the victim of a breach of contract, which might well be involuntary, to allow his damages to balloon (when he could easily prevent that from happening), as he might be tempted to do in order to force a lucrative settlement. The duty to mitigate damages is of course a general contractual duty, *Restatement (Second) of Contracts* § 350 (1981), not anything special to insurance, illustrating our earlier point about the insurance function of contracts that are not explicit contracts of insurance.

Thus, either Mid-Atlantic's losses were an unforeseeable (to Moran) consequence of delay in delivery of the quarterly statements, or Mid-Atlantic failed to mitigate its losses as required by contract law, or both. So its claim of damages fails, *Turner v. Shalberg*, 70 S.W.3d 653, 659 (Mo. App. 2002); *Birdsong v. Bydalek*, 953 S.W.2d 103, 116-17 (Mo. App. 1997); *Mansfield v. Trailways, Inc.*, 732 S.W.2d 547, 552-53 (Mo. App. 1987); *American Surety Co. v. Franciscus*, 127 F.2d 810, 815 (8th Cir. 1942) (Missouri law); *USA Group Loan Services, Inc. v. Riley*, 82 F.3d 708, 712 (7th Cir. 1996); *Restatement (Second) of Contracts*, *supra*,

§§ 350(1), 351(1) and comments a and b, and we turn to the issue of Moran's liability to Susan Camp under the Equal Credit Opportunity Act.

Mid-Atlantic argues that we have no jurisdiction to consider Moran's challenge to the judgment for Camp, because Moran did not mention that judgment in its notice of appeal, as required by Fed. R. App. P. 3(c) (the notice of appeal must "designate the judgment, order or part thereof appealed from"). Moran's notice of appeal just mentioned the order turning down its motion for judgment as a matter of law (or alternatively for a new trial), and that motion was limited to its dispute with Mid-Atlantic. But the district judge had earlier indicated his unwillingness to question the validity of the regulation of the Federal Reserve Board on which, as we are shortly to see, Susan Camp's claim is based. In effect Moran has treated that indication as an interlocutory order, which an appeal from the final order in the case, turning down Moran's motions directed at Mid-Atlantic, would bring up to the court of appeals. *E.g., Kunik v. Racine County*, 106 F.3d 168, 172 (7th Cir. 1997). An indication is not an order, but it is close enough, as there is no suggestion of prejudice to Mid-Atlantic, and "inept" attempts to comply with Rule 3(c) are accepted as long as the appellee is not harmed. *Foman v. Davis*, 371 U.S. 178, 180-82, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 571-72 (7th Cir. 1999); *Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542, 1546-47 (7th Cir. 1985). So on to the merits.

At first blush, the Equal Credit Opportunity Act has no relevance to this case. So far as the prohibition against discrimination on the basis of marriage is concerned (the Act prohibits discrimination on grounds of race, sex, age, etc., as well), it is apparent that what the Act was intended to do was

to forbid a creditor to deny credit to a woman on the basis of a belief that she would not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility. *Midkiff v. Adams County Regional Water District*, 409 F.3d 758, 771 (6th Cir. 2005); *Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982). Susan Camp was not an applicant for credit, and neither received credit nor was denied it. Instead she guaranteed her husband's debt and by doing so enabled his company to buy groceries from Moran on credit.

The Federal Reserve Board, however, has defined "applicant" for credit (the term in the statute) to include a guarantor. 12 C.F.R. §§ 202.2(e), 202.7(d). We doubt that the statute can be stretched far enough to allow this interpretation. (*Anderson v. United Finance Co.*, *supra*, 666 F.2d at 1276-77, assumes the validity of the regulation, but without discussion of the point.) It is true that courts defer to administrative interpretations of statutes when a statute is ambiguous, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980), and that this precept applies to the Federal Reserve Board's interpretation of ambiguous provisions of the Equal Credit Opportunity Act. *Diaz v. Virginia Housing Development Authority*, 117 F. Supp. 2d 500, 506-07 (E.D. Va. 2000); *see* 15 U.S.C. § 1691b(a)(1). But there is nothing ambiguous about "applicant" and no way to confuse an applicant with a guarantor. What is more, to interpret "applicant" as embracing "guarantor" opens vistas of liability that the Congress that enacted the Act would have been unlikely to accept. If a person is denied credit, or given credit but charged a higher interest rate, on some basis forbidden by the Act, the damages will usually be modest. One can *imagine* cases where for want of credit from a particular lender a tremendous business opportunity was lost, but such

cases—another example of appeal to the want-of-a-nail adage—are rare and difficult to prove. Damages in other cases will be limited to the cost of the higher interest, or the inconvenience of arranging alternative credit or getting one's credit restored, or embarrassment at being thought not creditworthy, or emotional distress at being thought a deadbeat or at feeling oneself a victim of discrimination. *See, e.g., Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 n. 3 (3d Cir. 1996) *Casella v. Equifax Credit Information Services*, 56 F.3d 469, 474-75 (2d Cir. 1995); *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 296-97 (5th Cir. 1993); *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986). It is otherwise if a guaranty is found to be unlawful. For then, as Susan Camp (not content with the modest damages that she obtained in the district court) contends in the cross-appeal, the guaranty would be unenforceable and the creditor might lose the entire debt.

But even if the Federal Reserve Board's interpretation is authorized, Susan Camp must lose because she failed to prove discrimination. All that the evidence shows on that score is that when Moran looked at the list of assets submitted by Roger Camp, who had agreed to guarantee repayment of any debts that Mid-Atlantic incurred to Moran, it noticed that several residences were included and so it naturally and correctly assumed that Mrs. Camp had an interest in those assets. The residences of a married couple are usually owned either jointly or by the spouse other than the one who included them in the list of assets that he submitted to obtain credit. Often spouses don't know the precise allocation of property between them because it has been made by their lawyer in order to minimize estate tax or to make it harder for creditors to seize property in the event of a default. In fact some $2.5 million of the $8.2 million in assets listed on Mr.

Camp's credit application were actually owned by Mrs. Camp. It was therefore sound commercial practice unrelated to any stereotypical view of a wife's role for Moran to require that she guarantee the debt along with her husband. As far as appears, had they been unmarried but living together whether as boyfriend and girlfriend or as siblings, or father and daughter, or just roommates, as soon as Moran learned that Roger Camp was living with someone it would have realized that one or more of the residences on Camp's list of assets might be owned with someone else or maybe owned entirely by someone else. And so it would have insisted on the guaranty. If so, there was no discrimination on the basis of marital status. *Crestar Bank v. Driggs*, No. 93-1036, 1993 U.S. App. LEXIS 14256, 1993 WL 198187, at *1 (4th Cir. June 11, 1993) (per curiam) ("the evidence supports the defendant's contention that Kimberlee Driggs was asked to assume liability on the note because the loan officers believed she was a principal in the transaction"); *cf. McKenzie v. U.S. Home Corp.*, 704 F.2d 778, 779 (5th Cir. 1983); 12 C.F.R. § 202.7(d)(4). And as far as the record reveals, it is so.

We conclude that Mid-Atlantic failed to prove any amount of damages to offset against the debt that it owed Moran, and that Moran infringed no right that Susan Camp has under the Equal Credit Opportunity Act. The judgment of the district court is therefore reversed and the case remanded with instructions to enter a final judgment for Moran on all claims.

REVERSED AND REMANDED, WITH DIRECTIONS.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**SOUTH BEND DIVISION**

**No. 3:00-CV-227-RM**

**[August 2, 2005]**

| | |
|---|---|
| MORAN FOODS, INC., d/b/a SAVE-A-LOT, LTD., Plaintiff/Counterclaim Defendant, | ) |
| v. | ) |
| MID-ATLANTIC MARKET DEVELOPMENT COMPANY, LLC; MIDWEST MARKETS, LLC; ROGER V. S. CAMP; and SUSAN CAMP. Defendants/ Counterclaimants | ) |

### OPINION AND ORDER

A jury found in favor of Mid-Atlantic Market Development Co., LLC and Midwest Markets, LLC on their breach of contract counterclaim against Moran Foods, Inc. The jury fixed the amount of damages at $3,006,314. Moran thinks this amount of damages is excessive and unsupported by the evidence presented at trial. Accordingly, Moran now renews its motion for judgment as a matter of law (its oral

motion was denied during the trial) pursuant to FED. R. CIV. P. 50. Moran asks the court to enter judgment in its favor on Mid-Atlantic's and Midwest's breach of contract counterclaim, or, in the alternative, to order a new trial limited to the issue of damages on that claim.

A court may set aside a jury's verdict if the winning party "has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to [have found] for the party on that issue." FED. R. CIV. P. 50. *See also Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 578-579 (7th Cir. 2003) ("The standard governing a Rule 50 motion mirrors that employed in evaluating a summary judgment motion." The court looks to all the evidence in the record, construes it in the light most favorable to the nonmoving party, avoids weighing witnesses' credibility, and asks whether any reasonable jury could have found in favor of the nonmoving party.) (citations omitted). In ruling on a Rule 50 motion the court does not set itself up as the de novo factfinder; the question isn't whether the court would have reached the same verdict as the jury had this been a bench trial. The relevant inquiry is more narrow: is there a sufficient evidentiary basis from which a reasonable jury could have reached its verdict. *See Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d at 578-579.

In the alternative, a court may order a new trial under Rule 59. When, as here, the Rule 59 "motion is based primarily on the excessive nature of the damages, the jury's award may be vacated and a new trial granted only if the verdict is monstrously excessive or if there is no rational connection between the evidence on damages and the verdict." *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 516 (7th Cir. 1992) (internal quotations and citations omitted).

The court cannot overturn the jury's verdict in this case because the evidence admitted at trial—particularly the portions of Roger Camp's testimony cited in the counterclaimants' memorandum opposing Moran's Rule 50 motion—provides a sufficient basis from which a reasonable jury could conclude that Mid-Atlantic and Midwest have incurred damages in the amount of $3,006,314 because of Moran's breach of contract.

Accordingly, Moran's Rule 50 motion [docket no. 309] is DENIED, and its alternative Rule 59 motion [docket no. 309] is also DENIED.

SO ORDERED.

ENTERED: August 2, 2005

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**SOUTH BEND DIVISION**

**Cause No. 3:00-CV-227 RM**

**[Filed January 31, 2005]**

| | |
|---|---|
| MORAN FOODS, INC., d/b/a SAVE-A-LOT, LTD., Plaintiff/Counterdefendant, | ) |
| v. | ) |
| MID-ATLANTIC MARKET DEVELOPMENT COMPANY, LLC; MIDWEST MARKETS, LLC; ROGER V. S. CAMP; and SUSAN CAMP, Defendants/Counterclaimants. | ) |

### MEMORANDUM AND ORDER

In its rulings on numerous pretrial motions the court resolved many of the claims between the parties. On May 23, 2001 the court entered summary judgment for Moran Foods as to the defendants' liability on Moran's breach of contract, guaranty, and account claims; it denied summary judgment as to Moran's *quantum meruit* claim (because Moran would likely receive an adequate legal remedy on its breach of

contract action), and denied summary judgment as to Moran's request for damages (because the amount was still in dispute). After the court entered its May 23, 2001 order Moran Foods clarified its request for damages, and on April 26, 2002 the court awarded those damages, along with 22% prejudgment interest, to Moran. Also with its April 26, 2002 order the court denied Moran's request for attorneys fees and costs, dismissed the defendants' declaratory judgment counterclaim, and granted summary judgment on all but two of the defendants' remaining counterclaims.

The court held a three-day jury trial to resolve the defendants' two surviving counterclaims against Moran Foods; Mid-Atlantic Market Development Co., LLC and Midwest Markets, LLC counterclaimed for breach of contract, and Susan Camp counterclaimed for a violation of the Equal Credit Opportunity Act. The jury returned a verdict of $3,006,314.00 in favor Mid-Atlantic and Midwest on their breach of contract counterclaim, and a verdict of $50,000.00 in favor of Susan Camp on her ECOA counterclaim. After the jury's verdicts were announced, the court withheld entry of final judgment and invited the parties to submit memoranda suggesting what form the final judgment should take. The parties filed those memoranda and responses to each other's proposals. The court stated that after considering the parties' proposals and entering final judgment, it would then allow 10 days for filing post-trial motions. After briefly recounting the parties' proposed forms of judgment below, the court now enters its final judgment.

## DEFENDANTS' PROPOSAL

Mid-Atlantic and Midwest propose that the $3,006,314.00 verdict in their favor should be used to off-set completely any damages they owe to Moran Foods pursuant to the court's

May 23, 2001 and April 26, 2002 orders. FED. R. CIV. P. 13(c) ("A counterclaim may or may not diminish or defeat the recovery sought by the opposing party."). The defendants also propose that the partial summary judgment against Roger and Susan Camp based on their personal guaranties should be vacated because the debts they guaranteed have now been satisfied by the off-setting judgments. Mid-Atlantic and Midwest assure the court their current bankrupt status doesn't preclude a setoff. 11 U.S.C. § 553(a); *In re: Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 896 F.2d 54, 59 (3rd Cir. 1990) ("contractual obligations are debts for purposes of setoff" and there was a "valid pre-petition claim based on breach of contract. Although this claim had not been reduced to judgment on the filing date, it is nonetheless a valid claim . . . eligible for setoff under section 553.").

The defendants proceed to calculate the value of Moran's judgment against them under several formulae that all produce sums less than the $3,006,314.00 jury verdict they won against Moran at trial. Based on their assertion that their verdict is larger than Moran's judgment against them, the defendants say Moran should now pay them the difference between the value of the two judgments. For reasons stated below the court is unpersuaded by the defendants' claim to any award beyond simply off-setting Moran's judgment against them, so it need not recount any of the defendants' calculations here.

The jury awarded Mrs. Camp $50,000.00 on her ECOA claim. In its April 26, 2002 order the court ruled that Mrs. Camp's ECOA claim sounded only in recoupment of the debt she owed to Moran Foods, not as an affirmative right of recovery, because the court believed Mrs. Camp had signed all seven guaranties more than two years before she filed her ECOA counterclaim. *See* 15 U.S.C. § 1691e(f) (two year

statute of limitations for ECOA actions). Because the jury's verdict on the defendants' counterclaims has effectively cancelled out Mrs. Camp's indebtedness, she is unable to recover anything by way of recoupment. However, Mrs. Camp now makes clear that she signed three of the seven guaranties within two years of filing her counterclaim on June 5, 2000. She contends that 3/7 of the $50,000.00 — which is $21,428.57 — should therefore be an affirmative recovery and not merely a (now uncollectible) recoupment.

MORAN FOODS' PROPOSAL

Moran's proposal for entering final judgment first makes clear that Moran does not waive its right to file motions to alter or amend the judgment, seek a new trial, or otherwise seek relief from the jury's verdict. As to the judgment itself, Moran proposes that its judgment against the defendants should be used as a setoff against the jury's verdict in favor of the defendants. FED. R. CIV. P. 13(c); 11 U.S.C. § 553; *United States v. Maxwell,* 157 F.3d 1099, 1102 (7th Cir. 1998) ("The Bankruptcy Code neither expands nor constricts the common law right of setoff."). Moran also argues that the doctrine of judicial estoppel should be applied to prevent the defendants from asserting that the jury's verdict in their favor was larger than the value of Moran's judgment against them.

In addition to using its judgment to off-set the jury's verdict in favor of Mid-Atlantic Market Development Co., LLC and Midwest Markets, LLC, Moran also asks the court to enter judgment against Mid-Atlantic Markets, LLC. Mid-Atlantic Markets, LLC didn't join the breach of contract counterclaim on which the jury awarded $3,006,314.00 and is not bankrupt, so Moran argues "there is no reason why [Moran's] judgment should not be entered against that entity." The defendants dispute this theory in their response and argue

that Moran is not entitled to what would essentially be "a double recovery of over $6,000,000.00 on its claims."

Moran says Mrs. Camp's ECOA claim is one for recoupment so she can't recover more than the amount of her indebtedness. Because the jury's verdict on the breach of contract counterclaim effectively off-set her indebtedness to Moran, Moran contends that Mrs. Camp should recover nothing by way of her $50,000.00 jury verdict. Moran bases this position on the court's April 26, 2002 order and on its understanding that Mrs. Camp filed her ECOA counterclaim after the two-year statute of limitations had run.

## ANALYSIS
## BREACH OF CONTRACT COUNTERCLAIM

The court agrees with the parties that Moran's judgment against the defendants' and the jury's verdict for Mid-Atlantic Market Development Co., LLC and Midwest Markets, LLC on their breach of contract counterclaim should offset each other. *See* FED. R. CIV. P. 13(c); 11 U.S.C. § 553. The court further agrees with Moran that the doctrine of judicial estoppel applies to prevent the defendants from asserting that the value of the jury's verdict in their favor exceeds the amount of Moran's judgment against the them. Finally, with respect to the breach of contract counterclaim, the court agrees with the defendants that Moran is not entitled to the double recovery that would result if it were allowed to use its judgment once to offset the jury's verdict, then use it again to collect $3,006,314.00 from Mid-Atlantic Markets, LLC.

"Judicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine,* 532 U.S. 742, 750 (2001) (internal quotations and citations omitted). Its "purpose is to protect the integrity of the judicial process . . .

by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* (internal quotations and citations omitted).

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

*New Hampshire v. Maine,* 532 U.S. at 749, quoting *Davis v. Wakelee,* 156 U.S. 680, 689 (1895). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine,* 532 U.S. at 749, quoting *Pegram v. Herdrich,* 530 U.S. 211, 227 n.8 (2000).

Judicial estoppel is properly applied here. Counsel for the defendants has done just what the Supreme Court described at length in *New Hampshire.* In closing argument, defendants' counsel described Moran's judgment to the jury: "if you do the math, 22 percent per annum compounded daily, that number comes out today to be over three million dollars, a judgment against these companies, a debt that was owed by these companies that never would have happened had Save-A-Lot given the reports that they were required to give under this agreement." Trial Transcript 525-526. Defense counsel then asked the jury to render a verdict in the amount of $3,006,314.00. The jury returned a verdict in that exact amount, and now the defendants propose that the actual value of Moran's judgment is hundreds of thousands of dollars less.

Three factors are used to determine when judicial estoppel should be applied; all three are present here. *New Hampshire v. Maine,* 532 U.S. at 750-751. "First, a party's later position must be clearly inconsistent with its earlier position." *Id.* (internal quotations and citations omitted). The defendants claim the value of Moran's judgment is hundreds of thousands of dollars less than they asserted at trial, a position clearly inconsistent with their earlier one.

"Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* at 751 (internal quotations and citations omitted). Acceptance of the defendants' reduced assessment of Moran's judgment would create the perception that defense counsel misled the jury during closing argument.

"A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine,* 532 U.S. at 751 (citations omitted). Acceptance of the defendants' new position at this point would permit them to derive an unfair advantage to Moran's detriment. The discrepancy between the defendants' closing argument and their proposed final judgment at the very least gives the appearance of "deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine,* 532 U.S. at 750. Judicial estoppel is properly applied here also because it produces two equal judgments (one for Moran and one for the defendants) that cancel each other out in a setoff, a result that accurately reflects the jury's intended verdict.

Moran agrees that its judgment should be used to cancel out the defendants' jury verdict on the breach of contract counterclaim, but Moran also seeks to collect its judgment from Mid-Atlantic Markets, LLC, a non-bankrupt company that did not join in the counterclaim. As the defendants correctly observe in their response, Moran essentially asks the court to let it count its judgment twice: once to offset the jury's verdict against it, and a second time to collect $3,006,314.00 from Mid-Atlantic Markets, LLC. Moran hasn't attempted to cite any authority that would permit this type of double recovery, and the court is confident that none exists. Moran can use its judgment as a setoff against the jury's verdict, but it cannot then use the same judgment again to collect from Mid-Atlantic Markets, LLC.

## ECOA CLAIM

The court's April 26, 2002 order said Mrs. Camp's ECOA claim sounded only in recoupment because she filed it after the two-year statute of limitations had run. This meant she could collect no more on her ECOA action than the amount of her indebtedness to Moran. Because the jury's verdict on the defendants' counterclaim has cancelled her debt to Moran, Mrs. Camp can recover nothing by way of recoupment. She has now, however, clarified for the court that three of the seven guaranties she signed were signed within two years of filing her ECOA counterclaim. This places her ECOA action within the statute of limitations as to those three guaranties and permits an affirmative recovery with respect to those three guaranties. *See* 15 U.S.C. § 1691e.

Mrs. Camp agrees that her debt has been canceled by the jury's verdict on the breach of contract counterclaim, but argues that she is entitled to collect 3/7 of her $50,000.00

jury verdict as an affirmative recovery. Moran doesn't challenge her proposal in its response so it has conceded the point. Mrs. Camp should receive 3/7 of her $50,000.00 jury award ($21,428.57) as an affirmative recovery from Moran on her ECOA counterclaim.

JUDGMENT OF THE COURT

For all the reasons stated above, the jury's verdict on the breach of contract counterclaim shall be a setoff equal to the amount of Moran's judgment against the defendants, and no party shall take anything on the breach of contract counterclaim or on Moran's claims resolved earlier on summary judgment. Susan Camp shall recover from Moran in the amount of $21,428.57, which is 3/7 of the $50,000.00 the jury awarded her on her ECOA claim. The defendants' motion for entry of judgment [docket no. 304] is GRANTED insofar as the court enters this final judgment on the jury's verdict.

As stated at the conclusion of trial, the court AFFORDS the parties 10 days from the date of this order to file any post-trial motions.

SO ORDERED.

ENTERED: January 31, 2005

/s/Robert L. Miller, Jr.
Chief Judge
United States District Court

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**SOUTH BEND DIVISION**

**CAUSE NO. 3:00-CV-0227 RM**

**[Filed April 26, 2002]**

| | |
|---|---|
| MORAN FOODS, INC. d/b/a | ) |
| SAVE-A-LOT, LTD., | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| MID-ATLANTIC MARKET | ) |
| DEVELOPMENT COMPANY LLC, | ) |
| MIDWEST MARKETS LLC, | ) |
| MID-ATLANTIC MARKETS LLC, | ) |
| ROGER V. S. CAMP, and | ) |
| SUSAN CAMP, | ) |
| Defendants. | ) |
| | ) |

**MEMORANDUM AND ORDER**

Between May 31 and September 28, 2001, the parties filed several reconsideration and dispositive motions addressing the various issues in this case. The court began taking up these matters collectively until the parties reported a settlement on November 13, 2001. The settlement apparently went south,

and the parties moved to reinstate all motions, as filed, pending before November 13. The court granted that request at a hearing on March 20, and now issues the following rulings on these reinstated motions.

## I. INTRODUCTION

Founded in 1978, Moran Foods, which operates as Save-A-Lot, licenses the right to use the Save-A-Lot name to more than 800 grocery stores in more than thirty states, though primarily concentrated in the southeast. Moran supplies groceries and other products for its retailers to sell in the stores (typically a limited assortment of grocery items compared to larger supermarkets), offers marketing support to help the stores advertise their operations, and sometimes provides accounting and other services.

Mid-Atlantic Market Development Company, formed in 1997, owned about 70 percent of Mid-Atlantic Markets LLC, organized in 1998, and owned 100 percent of Midwest Markets LLC, organized also in 1998. Roger Camp owned about 80 percent of Mid-Atlantic Market Development Company. From August 13, 1997, to April 3, 2000, Moran entered into various license, supply, marketing, and retail accounting agreements with Mid-Atlantic Market Development and Midwest Markets, supported by guaranty agreements signed by Roger and Susan Camp.[1] These agreements spawned the operation of eight Save-A-Lot stores

---

[1] Mid-Atlantic Market Development Company apparently assigned some of the agreements to Mid-Atlantic Markets LLC, a point not altogether critical to this summary judgment ruling. The defendants admit that Mid-Atlantic Markets LLC was an operations company, and that Moran supplied it with groceries.

under the direction of these companies, one of which closed in July 1998.

From the inception of their relationship until April 2000, Moran Foods supplied groceries and services to all of the stores on credit. By March 17, 2000, from the seven stores then open, Mid-Atlantic had fallen some $530,582.56 in debt to Moran Foods, and Midwest had fallen some $766,511.77 in debt to Moran Foods. Mid-Atlantic and Midwest eventually filed for Chapter 11 bankruptcy. Moran requested the Camps to honor these debts in an April 4, 2000, letter, based on the guarantees they had signed, and, after receiving no payment, commenced this action to recoup the debts. The corporate defendants and the Camps asserted several defenses and counterclaims.

On May 23,2001, the court ruled on Moran's motion for summary judgment on its breach of contract, account, and *quantum meruit* claims. The court granted summary judgment as to liability on the contract and account actions, but denied summary judgment as to damages. The court also held that Susan Camp could not raise a violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, as an affirmative defense, but rather could only pursue it as a counterclaim. A series of reconsideration and dispositive motions then ensued.

## II. Motions to Reconsider

### *A. Moran Foods*

Moran asks the court to reconsider its May 23 order granting summary judgment on liability but reserving the question of damages for trial. Moran clarifies in its motion to reconsider the relief sought in its summary judgment motion and now requests an award of damages with prejudgment

interest at the rate of 22%, accruing as of April 3, 2000, and an assessment of attorneys fees and costs. The defendants dispute Moran's entitlement to damages, prejudgment interest, attorneys fees, and costs, and attempt to designate issues of fact precluding summary judgment on damages.

Although the summary judgment standard, *see Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1087-1088 (7th Cir. 2000), continues to apply to the issues on reconsideration, the posture of this motion deserves additional comment:

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment.... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

*Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987) (quoting *Keene Corp. v, International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-666 (N.D. Ill. 1983)) (citations omitted).

*1. Prejudgment Interest*

Moran asks the court to assess prejudgment interest, of 22% per annum on the amounts due to Moran as of April 3, 2000, and admitted by the defendants; the defendants contend that genuine issues of material fact preclude this award of damages. While the parties agree to the principal amount due,

the defendants argue that the amounts are incorrect to the extent prejudgment interest has been incorporated.

Under Missouri law, "it is lawful for the parties to agree in writing to any rate of interest, fees, and other terms and conditions in connection with any...[l]oan to a corporation, general partnership, limited partnership or limited liability company...."[2] MO. REV. STAT. § 408.035. "Entitlement to collect a higher rate of interest than nine percent from the borrower depends on proof that the borrower has contracted in writing to pay the higher rate." *Affiliated Acceptance Corp. v. Boggs,* 917 S.W.2d 652, 658 (Mo. Ct. App. 1996) (quoting *Addison v. Jester,* 758 S.W.2d 454, 458 (Mo. Ct. App. 1988)).

The defendants advance several arguments to avert a prejudgment interest award. First, they contend that Moran never requested prejudgment interest in the summary judgment proceedings until its reply brief; as a result, the matter had not been fully argued. The court disagrees: Moran clearly requested prejudgment interest in its initial brief accompanying its summary judgment motion, so the defendants were required to come forth with evidence to rebut any entitlement to summary judgment on prejudgment interest

---

[2] As stated in the May 23, 2001 order, and given no reason to depart from it, the court continues to apply Missouri law to this case. *See, e.g., Jupiter Aluminum Corp. v. Home Ins. Co.,* 225 F.3d 868, 873 (7th Cir. 2000) ("Federal courts sitting in diversity must look to the conflict-of-laws rules of the forum state for the applicable substantive law."); *Huff Biomet, Inc.,* 654 N.E.2d 830, 834 (Ind. Ct. App. 1995) ("When the parties to a contract agree on the law which should control the contract," Indiana courts "give effect to their agreement.").

at that time. *See* Fed. R. Civ. P. 56(e); N.D. Ind. Local Rule 56.1.

Second, the defendants raise anew arguments offered in the summary judgment proceeding to create a factual issue on prejudgment interest, including whether the parties entered into a revised payment plan and whether Mid-Atlantic Markets acted as an unauthorized company for Save-A-Lot stores. The court addressed these arguments in its May 23 order granting partial summary judgment, and nothing indicates any manifest error of law or fact. *See Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d at 251. These arguments also primarily concern liability and have little bearing on the damages issue of prejudgment interest.

Third, while the defendants appear to concede that Mid-Atlantic agreed to the 22% rate (absent a revised payment plan, an argument already found unavailing), they contend that Midwest never entered into such an agreement. This argument, however, appears nowhere in their summary judgment submissions and cannot be presented for the first time on reconsideration. *See Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d at 251 ("Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time."). Indeed, it seems quite contrary to their own statements, including that "Moran and [Mid-Atlantic] and [Mid-West] had been engaged in a business relationship under various agreements," citing the very agreements that incorporate the payment policy containing the 22 percent interest rate.

Fourth, the defendants argue that they actually raised factual issues as to the principal amounts and prejudgment interest due during the summary judgment proceeding and

articulate four such issues.[3] The primary, issue is that the weekly statements prepared by Moran incorporated interest of 22 percent per annum.[4] Other than this contention, the

---

[3] Two of the four factual issues that the defendants designate concern the adoption of a revised repayment schedule, not the assessment of prejudgment interest, so these issues do not apply. The third issue rests upon the new evidence submitted by the defendants with their response to reconsideration, which includes some 622 pages of additional evidence and the affidavit of Bruce VanOverloop, executed after the May 23 order. The defendants provide no reason for the court to consider this evidence now on reconsideration. The proper time to submit this evidence was in response to Moran's summary judgment motion. *See* Fed. R. Civ. P. 56(e); N.D. Ind. L.R. 56.1; *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d at 251 ("Such motions [for reconsideration] cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment."); *see also Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) ("A party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier.").

[4] As factual support for this argument, the defendants originally cited to an excerpt from the deposition of Joseph Higgs, which wasn't included within the exhibits submitted with their brief in opposition. The court was consequently left with Moran's exhibits to determine whether the statements included 22 percent interest. *See* Fed. R. Civ. P. 56(e); N.D. Ind. L.R. 56.1 ("the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the 'Statement of Genuine Issues' filed in opposition to the motion, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file").

defendants originally identified and currently identify no other problem with the amounts claimed by Moran, and, as Moran points out and the summary judgment record reveals, this contention could concern only amounts before April 3, 2000; prejudgment interest after that has not been incorporated, and Moran is entitled to its damages of $530,582.56 and $766,511.77 with prejudgment interest to accrue from April 3, 2000.

The parties contest the percentage of prejudgment interest, however. Moran asserts the 22 percent stated in the agreements. The defendants argue that an interest rate exceeding 10 percent violates § 408.030, Missouri's usury statute. *See, e.g., Redd v. Household Fin. Corp.*, 622 S.W.2d 255, 257 (Mo. Ct. App. 1981). The defendants argue that because 22 percent is usurious, the agreement to pay that interest rate is void and unenforceable. The usury statute doesn't apply here, though. "In Missouri it is well accepted that usury is the taking or exacting of interest at a rate in excess of that allowed by law for the loan or use of money. It is equally well accepted that § 408.030...applies only to a loan of money and has no application to the bona fide sale of goods." *Redd v. Household Fin. Corp.*, 622 S.W.2d at 257; *accord Rice's Feed Serv., Inc. v. Dodson,* 904 S.W.2d 475, 479-480 (Mo. Ct. App. 1995) (usury statute inapplicable to sale of cattle feed on account to a partnership). This case involved the sale of groceries, not loans of money, so § 408.030 does not apply.

Missouri law authorizes prejudgment interest of 9 percent absent an agreement to the contrary. *See* MO. REV. STAT, § 408.020. When the parties agree, the specific agreed rate of interest controls unless "otherwise excessive under the law." *J.R. Waymire Co. v. Antares Corp.*, 975 S.W.2d 243, 248 (Mo. Ct. App. 1998); *Schnucks Carrollton Corp. v. Bridgeton*

*Health and Fitness Inc.*, 884 S.W.2d 733, 740 (Mo. Ct. App. 1994). The defendants use this phrase to argue against prejudgment interest at 22 percent, and cite to cases within this circuit advising use of the prime rate prevailing during the litigation.

The court interprets the phrase from *J.R. Waymire* and *Schnucks* to mean essentially "contrary to statute." Both cases cite to the same authority for their mirrored statement: *Estate of Bruce v. Bruce,* 767 S.W.2d 598 (Mo. Ct. App. 1989); *Gus T. Handge & Son Painting Co. v. First Bank & Trust Co.*, 756 S.W.2d 652 (Mo. Ct. App. 1988); *see also Unlimited Equip. Lines, Inc. v. The Graphic Arts Ctr., Inc.*, 889 S.W.2d 926, 942 (Mo. Ct. App. 1994) (citing *Bruce*). *Handge & Son* enforced an agreed-upon interest rate, saying nothing about excessive interest rates other than to mention the painting company's argument that the interest rate the trial court enforced exceeded the *statutory* rate of 9 percent under § 408.020. 756 S.W.2d at 652. *Bruce* held that a 12 percent rate for a private loan exceeded the *statutory* limit of 10 percent under an older version of § 408.030. 767 S.W.2d at 601. These cases speak of excessiveness only in statutory terms.[5] *See also Flipps Nine, Inc. v. Missouri Property and Casualty Ins. Guar.*, 941 S.W.2d 564, 569 (Mo. Ct. App. 1997) ("an agreement to act in violation of a statute is void and unenforceable"); *Wyatt v. Commercial Credit Corp.*, 341 S.W.2d 348, 352 (Mo. Ct. App. 1960) (addressing excessiveness in statutory terms).

These parties agreed to an interest rate of 22 percent, which comports with Missouri statute. *See* MO. REV. STAT.

---

[5] Neither party has raised any issue of unconscionability, and the court does not consider it here.

§ 408.020. The 22 percent per annum interest rate is not "otherwise excessive under the law." *J.R. Waymire Co. v. Antares Corp.*, 975 S.W.2d at 248. Aside from this interpretation, however, the court does not believe the 22 percent per annum interest rate to be excessive under Missouri law. *See, e.g., Rice's Feed Serv. v. Dodson,* 904 S.W.2d at 476-480 (enforcing prejudgment interest rate of 18%); *Scnucks Carrollton Corp. v. Bridgeton Health and Fitness,* 884 S.W.2d at 740 (same).

Next, Susan Camp alone argues that, because she may be entitled to an offset of counterclaim damages under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq,* and because case law supports a damages award equal to the guaranty amount, the damage awards could be a wash, and Moran would not be entitled to prejudgment interest because it had not lost any time-value of money. The court disagrees:

> The right of one party to recover interest on a liquidated demand is not necessarily dependent upon a showing that all claims interposed by his adversary are likewise liquidated.... Where plaintiff's demand is liquidated, the interposition of an unliquidated counterclaim or set-off does not convert the liquidated demand into an unliquidated one or preclude plaintiffs recovery of prejudgment interest, even though such counterclaim or set-off puts the amount payable in doubt.

*American Laminates, Inc. v. J. S. Latta Co.*, 980 S.W.2d 12, 24-25 (Mo. Ct. App. 1998) (quoting *Burger v. Wood,* 446 S.W.2d 436, 444 (Mo. Ct. App. 1969)); *accord Herbert & Brooner Constr. Co. v. Golden,* 499 S.W.2d 541, 553 (Mo. Ct. App. 1973) ("A claim is not converted into an

unliquidated one simply by 'the interposition of an unliquidated counterclaim, set-off or recoupment.'").

In addition, any damages awarded for a purported ECOA violation may not equal the amount of the guaranty. *See, e.g., CMF Virginia Land v. Brinson,* 806 F. Supp. 90, 95-96 (E.D. Va. 1992) (noting that only parties who successfully demonstrate "egregious" ECOA violations may be entitled to damages equal the guaranty amount).

An award of prejudgment interest presupposes only that the expenses are due, that the amount is liquidated or readily ascertainable, and that a demand has been made, all of which are present in this case. *See McCormack v. Stewart Enters., Inc.,* 956 S.W.2d 310, 314 (Mo. Ct. App. 1997); *see also Baris v. Layton,* 43 S.W.3d 390, 397-398 (Mo. Ct. App. 2001). There is no genuine issue of material fact, and Moran is entitled to its damages plus 22 percent per annum prejudgment interest to accrue as of April 3, 2000.

*2. Attorneys Fees and Costs*

Moran requests attorneys fees and costs; the defendants oppose that request. Both sides focus their attention on whether Moran is the "prevailing party" so as to qualify for attorneys fees and costs. Although Missouri law governs the enforcement of the attorneys fees provision within the contracts, particularly in this case whether Moran qualifies as a "prevailing party," *see Vaughn v. Willard,* 37 S.W.2d 413, 417 (Mo. Ct. App. 2001), *Schnucks Carrollton Corp. v. Bridgeton Health and Fitness,* 884 S.W.2d at 739, the rules of this court govern the procedure for obtaining them. *See* Fed. R. Civ. P. 54(d); N.D. Ind. L.R. 54.1.

The court need not address the substance of Missouri law at this point, because the issue of attorneys fees and costs is not ripe." *See, e.g., Minority Police Officers Ass'n of South Bend v. City of South Bend,* 721 F.2d 197, 200 (7th Cir, 1983) ("A partial summary judgment is merely an order deciding one or more issues in advance of trial; it may not be a judgment at all, let alone a final judgment on a separate claim."); Fed. R. Civ. P, 54(a) and 54(d)(2)(B) (defining judgment and contemplating filing of motion for fees after "entry of judgment"); N.D. Ind. L.R. 54.1 (contemplating filing of motion for fees after "entry of final judgment"). The court consequently denies Moran's request, with leave to later file a separate motion, properly supported, for attorneys fees and costs under Rules 54 and 54.1.

*B. The Defendants*

The defendants also ask the court to reconsider its May 23 summary judgment order. They argue that Moran's conduct rendered their performance under the contracts impossible and that a genuine issue of material fact remains as to the agreements in effect; they also reassert the arguments against prejudgment interest. The defendants ask the court to reconsider its May 23 order predicated on evidence originally before the court, evidence newly submitted with their response, and an opinion recently rendered by the Missouri Supreme Court.

The court has addressed each of these arguments previously in this order, except for impossibility.[6] Moran

---

[6] Some of these arguments rest on evidence newly submitted with the cross-motions for reconsideration and even evidence—for example, the affidavit of John Frizzo—used farther down the road.

contends that the defendants never raised impossibility in their answer or summary judgment briefs and thus waived the argument. The court disagrees, without discussing the finer nuances, if any, between the defenses of prevention and impossibility under Missouri law. *See, e.g., Farmers' Elec. Coop., Inc. v. Missouri Dept. of Corrections,* 977 S.W.2d 266, 271 (Mo. 1998); *AEE-EMF, Inc. v. Passmore,* 906 S.W.2d 714, 718 (Mo. Ct. App. 1995). Nonetheless, the defendants' argument remains the same: that Moran prevented or rendered impossible their performance. Nothing within that argument, however, reveals a manifest error of law or fact in the court's original treatment on summary judgment, so the motion for reconsideration on this basis must be denied.

Both sides raise particularly interesting arguments as to an opinion issued by the Missouri Supreme Court on June 26, 2001, after this court's partial summary judgment order. *See Boone Nat. Savings & Loan Ass'n v. Crouch,* 47 S.W.3d 371

---

In the reply brief supporting the cross-motion, the defendants argue that the "volume of papers to be processed in this case and the need for additional analysis from defendants' expert, John S. Frizzo, before all issues with the invoices could be fully understood and appreciated, constitute new evidence and/or good cause for reconsideration." Again, the time to submit their evidence was in response to the summary judgment motion. *See* Fed. R. Civ. P. 56(e); N.D. Ind. L.R. 56.1; *Rothwell Cotton Co. v. Rosenthal & Co.,* 827 F.2d at 251 ("Such motions [for reconsideration] cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment."), If the defendants believed that they needed more time to collect and analyze the evidence, Rule 56(t) provides their relief.

(Mo. 2001). The defendants say *Crouch* requires the court to revisit its determination that Ms. Camp cannot avoid summary judgment by asserting her ECOA claim as an affirmative defense. Moran says *Crouch* is beside the point.

*Crouch* does not mandate an alternative summary judgment ruling. With all deference to the Missouri Supreme Court, the *Crouch* opinion constitutes a state court interpretation of a federal law to which this court is not bound. *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 43 (1989) ("the meaning of a federal statute is necessarily a federal question"); *RAR, Inc. v. Turner Diesel Ltd.,* 107 F.3d 1272, 1276 n.1 (7th Cir. 1997) (it is "beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question"); *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.,* 799 F.2d 265, 273 (7th Cir. 1986) ("When the statute is federal, federal law determines not only whether the statute was violated but also, if so, and assuming the statute itself is silent on the matter, the effect of the violation on the enforceability of the contract."); *Roloff v. Sullivan,* 772 F. Supp. 1083, 1092 (N.D. Ind. 1991) ("neither must the court follow state trial court rulings, particularly when they have ruled on federal law").

In addition, without clear indication to the contrary, the court must presume that Congress intended the ECOA to have uniform nationwide application, an intent not necessarily promoted by application of state law. *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. at 43; *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 119 (1983); *NLRB v. Natural Gas Utility Dist. of Hawkins County,* 402 U.S. 600, 603 (1971); *Jerome v. United States,* 318 U.S. 101, 104 (1943). Congress occasionally intends a federal statute to be

given content by state law, *see, e.g., De Sylva v. Ballentine,* 351 U.S. 570, 580 (1956); *Recostruction Fin. Corp. v. Beaver County,* 328 U.S. 204, 210 (1946); *Helvering v. Stuart,* 317 U.S. 154, 161-162 (1942), but the ECOA expresses no such intent, so the court must exercise its federal jurisdiction to interpret the statute to assure uniform nationwide application and to avoid potential impairment of the federal scheme. *See Dickerson v. New Banner Institute,* 460 U.S. at 119-120; *Jerome v. United States,* 318 U.S. at 104; *United States v. Pelzer,* 312 U.S. 399, 402-403 (1941). Resort to *Crouch,* a decision that relies in part upon a procedural idiosyncracy of Missouri law, *see Boone Nat. Savings & Loan Ass'n v. Crouch,* 47 S.W.3d at 374, would not promote uniform nationwide application of the ECOA.

Notwithstanding these limitations on *Crouch,* the court has been given some cause to rethink and clarify its position. The ECOA was "enacted to protect consumers from discrimination by financial institutions." *Midlantic Nat. Bank v. Hansen,* 48 F.3d 693, 699 (3rd Cir, 1995). Before the ECOA,

> it was customary for lenders to require the guarantee signatures of husbands whose wives sought credit, even when a credit check would have revealed that the wife was creditworthy on her own. The ECOA was implemented to prevent this discriminatory practice of forcing women to have their spouses guarantee any loan they wished to receive.

*CMF Virginia Land v. Brinson,* 806 F. Supp. at 95. The ECOA reflected a legislative intent to make "credit equally available to all creditworthy customers without regard to sex or marital status," *Miller v. Elegant Junk,* 616 F. Supp. 551, 553 (S.D.W.V. 1985) (quoting ECOA, Pub. L. No. 93-495, § 502, 88 Stat. 1511 (1974)), and as written, the statute

forbade discrimination based on marital status against any male or female "applicant." 15 U.S.C. § 1691(a).

Until October 1986, the ECOA prohibited discrimination against an "applicant" and endowed an"aggrieved applicant" with a cause of action to redress grievances. 15 U.S.C. §§ 1691(a) and 1691e(b). Congress defined "applicant," 15 U.S.C. § 1691a(b), which facially appeared to exclude a guarantor (like Susan Camp) from its definition, and the Federal Reserve Board promulgated Regulation B in its original form, which explicitly excluded a guarantor from the definition of "applicant," *see* 50 Fed. Reg. 48018 (Nov. 20, 1985), leading at least three federal courts concerned with guaranties signed before 1986 to hold that a guarantor lacked standing to raise an ECOA claim. *See Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994); *Boatman's First Nat. Bank v. Koger,* 784 F. Supp. 815, 816 (D. Kan. 1992); *Morse v. Mutual Federal Sav. & Loan Ass'n of Whitman*, 536 F. Supp. 1271, 1278 (D. Mass. 1982); *see also Delta Diversified, Inc. v. Citizens & Southern Nat. Bank,* 320 S.E.2d 767, 770-771 (Ga. Ct. App. 1984).

On October 1, 1986, the Federal Reserve Board promulgated a new form of Regulation B, which included in the definition of applicant "any person who is or may become contractually liable" for a credit extension and, for purposes of 12 C.F.R. § 202.7(d)—the section upon which this case centers—included "guarantors, sureties, endorsers and similar parties." 12 C.F.R. § 202.2(e); *see also* 50 Fed. Reg. 48018 (Nov. 20, 1985). The Board, in discussing this "substantive change," noted that under the statutory scheme originally enacted by Congress, a guarantor lacked standing, but that the Board wished to confer standing:

> If a creditor violates this provision, however, a guarantor whose signature has been illegally required currently has no legal remedy because section 706 of the act confers standing to sue only upon an "aggrieved applicant." The Board has included guarantors and similar parties within the definition of "applicant" to resolve this question of standing.

50 Fed. Reg. 48018, § 202.2 (Nov. 20, 1985).

It is not altogether clear, and the court has not been presented with the question, whether the Federal Reserve Board has the authority, affording it all deference due and mandated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and recognizing the seemingly broad powers granted the Board by Congress, *see* 15 U.S.C. § 1691b(a)(1), to confer statutory standing upon a larger class of individuals arguably not intended by Congress. *Compare* 15 U.S.C. § 1691a(b) (defining applicant) *with* 12 C.F.R. § 202.2(e) (defining applicant). Without the luxury of all the facts and arguments on this issue, it would be unadvisable for the court to venture into its dark recesses without the illuminating contributions of the parties, so the court concerns itself instead with the statutory and regulatory scheme that currently exists.[7]

---

[7] While the court often has an obligation to *sua sponte* raise issues affecting its subject matter jurisdiction, the court has not the same obligation to decide that question, otherwise not raised by the parties, when it would not divest the court of jurisdiction. In this case, both diversity and federal question jurisdiction exist, so this discussion in detour serves merely to raise, rather than to decide, an issue. *See also Baybank v. Bornhofft*, 694 N.E.2d 854, 858 (Mass. 1998) (raising related issue).

The issue is helpful in resolving today's issue, though. Whether the ECOA constitutes a counterclaim or affirmative defense appears to arise from the 1986 promulgation of Regulation B. It would seem a rare scenario in which an "applicant," in the true sense of the word and as originally interpreted before 1986, would need to assert the ECOA as an affirmative defense. If the applicant were discriminatorily denied credit—the originally intended protection—the applicant would simply sue and would never be sued because she never received money in the first place to cause the creditor to sue. If the applicant were extended credit, but only with a guarantor's signature, the applicant obtained what she wanted and what the ECOA protects, and the ECOA violation would thus serve (in some eyes) to invalidate only the guarantor's, never the applicant's, obligation. *See, e.g., Integra Bank/Pittsburgh v. Freeman,* 839 F. Supp. 326, 329-330 (E.D. Pa. 1993). In either case, the applicant has no need of the ECOA as an affirmative defense, and the issue seems only to come up with respect to guarantors.

The issue, then, is of fairly recent vintage. Of course, this court has the benefit of standing on the shoulders of other courts that have struggled with this issue, but the split within the federal court ranks demonstrates that interpreting the ECOA, as it currently is understood, and enforcing its protections is no simple task. This court takes solace in some of the wisdom imparted by courts on both sides of the issue and in the guidance offered by the Supreme Court in some of its recent cases, *see, e.g., Beach v. Ocwen Federal Bank,* 523 U.S. 410 (1998); *Reiter v. Cooper,* 507 U.S. 258 (1993), which have not yet been brought to bear on the issue.

Many, if not most, federal courts interpreting the ECOA, including one federal court in Indiana, have held that the statute creates a counterclaim, not an affirmative defense. *See*

*Federal Deposit Ins. Corp. v. 32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1480-1481 (D. Kan. 1995); *Federal Deposit Ins. Corp.. v. Skotzke*, 881 F. Supp. 364, 368 (S.D. Ind. 1994); *Resolution Trust Corp. v. Schonacher*, 844 F. Supp. 689, 695-696 (D. Kan. 1994); *Riggs Nat'l Bank of Washington, D.C., v. Webster*, 832 F. Supp. 147, 151 n.5 (D. Md. 1993); *Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D.Va. 1993), *aff'd*, 36 F.3d 370 (4th Cir. 1994); *CMF Virginia Land v. Brinson*, 806 F. Supp. 90, 95 (E.D. Va. 1992); *Diamond v. Union Bank & Trust*, 776 F. Supp. 542, 544 (N.D. Okla. 1991).[8] This weight of federal authority argues in favor of following that position to foster uniform application. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 43.

Other federal courts, in similarly well-reasoned opinions, have disagreed, adopting the view that the ECOA permits an affirmative defense, largely, when a counterclaim would be otherwise barred by the statute of limitations. *See Silverman v. Eastrich Multiple Inv. Fund*, 51 F.3d 28, 32-33 (3rd Cir. 1995); *Stornawaye Properties, Inc. v. Moses*, 76 F. Supp. 2d 607, 613-614 (E.D. Pa. 1999); *Sony Electronics, Inc. v. Putnam*, 906 F. Supp. 228, 229 (D.N.J. 1995); *Federal Deposit Ins. Corp. v. Medmark, Inc.*, 897 F. Supp. 511, 514

---

[8] *See also The Provident Bank v. Wright*, No. 00-C-6027, 2001 U.S. Dist. LEXIS 9621 (N.D. Ill. July 11, 2001); *McPherson v. Comerica Bank*, No. 93-CV-70261-DT, 1993 U.S. Dist. LEXIS 19405 (E.D. Mich. Dec. 8, 1993); *United States v. Joseph Hirsch Sportswear Co., Inc.*, No. 85-CV-1546, 1989 U.S. Dist. LEXIS 2246 (E.D.N.Y. Feb. 28, 1989).

(D. Kan. 1995); *Integra Bank/Pittsburgh v. Freeman,* 839 F. Supp. 326, 329-330 (E.D. Pa, 1993).[9]

"The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 409 (1993) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984)). The ECOA's plain language seems to reveal a congressional intent for the ECOA to be used as a sword, not a shield. Congress designed an affirmative cause of action with corresponding relief, making a creditor "liable" for actual damages, punitive damages, costs, and attorneys fees, and establishing a two-year statute of limitations for that action.[10] 15 U.S.C. § 1691e(a, b, f). Nothing in the statutory scheme even suggests that, in lieu of liability, the aggrieved applicant could avoid the otherwise enforceable obligation of a guaranty through defensive use of the ECOA. Indeed, Congress would have been prescient in doing so, since the ECOA originally gave no rights to guarantors.

The ECOA, of course, authorizes the court to grant equitable and declaratory relief," 15 U.S.C. § 1691 e(c), and the federal courts that have read the ECOA to provide an affirmative defense have used this provision's broad language

---

[9] *See also American Sec. Bank v. York,* No. 91-1212, 1992 U.S. Dist. LEXIS 14309 (D.D.C. Sept. 1,1992).

[10] Actual damages may include "out-of-pocket monetary losses, injury to credit reputation and mental anguish, humiliation or embarrassment." *Fischl v. General Motors Acceptance Corp.,* 708 F.2d 143, 148 (5th Cir. 1983); *accord Anderson v. United Fin. Co.,* 666 F.2d 1274, 1277 (9th Cir. 1982); *Ford v. Citizens and Southern Nat. Bank,* 700 F. Supp. 1121, 1124 (N.D. Ga. 1988).

to do so. *See, e.g., Silverman v. Eastrich Multiple Inv. Fund,* 51 F.3d at 32-33; *Integra Bank/Pittsburgh v. Freeman,* 839 F. Supp. at 329-330. Section 1691e(c) provides in full that, "[u]pon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter."

Federal statutes authorizing equitable relief are not extraordinary, and include, for example, ERISA and Title VII in addition to the ECOA. *See Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. __, 122 S. Ct. 708 (2002); *United States v. Burke,* 504 U.S. 229 (1992). Section 1691e(c) of the ECOA, much like these other provisions, reveals that the equitable relief available to the court is not unlimited. By its very nature, "equitable" relief means "something less than all relief," *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 258 n.8 (1993) (emphasis deleted) (defining equitable relief as "those categories of relief that were *typically* available in equity"), and § 1691e(c)'s plain language further limits equitable relief to that which is "necessary to enforce the requirements" of the ECOA. *Cf. id.* at 253 (discussing similar limitation on equitable relief to enforcing ERISA's provisions).

Section 1691e(c) also provides some guidance on how "aggrieved applicants" obtain this relief, and that is "[u]pon application," suggesting the use of an affirmative claim or counterclaim, not a defense.[11] To the extent any ambiguity

---

[11] The provision's subheading also reads "*Action* for equitable and declaratory relief," 15 U.S.C. § 1691e(c) (emphasis added), perhaps lending more support for this interpretation but for the fact that the subheading has been added by the compiler and, therefore, cannot

exists, the legislative history of the ECOA speaks nowhere of the ECOA as a defense, and the ancestor to this provision originally permitted an aggrieved applicant to "institute a civil action" for preventative or injunctive relief. ECOA of 1974, Pub.L. No. 93-495, *reprinted in* 1974 U..S.C.C.A.N. 1724, 1754. When amending the statute in 1976, Congress explained that, in addition to enforcement by appropriate agencies or the Attorney General, the "chief enforcement tool ...will continue to be private actions for actual and punitive damages," not defensive use of the ECOA's provisions. S. REP. NO. 94-589, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 415.

Nor do the regulations promulgated by the Federal Reserve Board "contain any words of affirmative defense." *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982). The court views the "absence of any provision for an affirmative defense in the [FRB's] credit regulations as an administrative construction of the statute that aids [the] determination of congressional intent." *Id.* "Caution must temper judicial creativity in the face of legislative or regulatory silence," *id.* (quoting *Ford Motor Credit Co, v. Milhollin,* 444 U.S. 555, 565 (1980)), and when an administrative agency has engaged in "comprehensive regulation" of credit practices, "the agency's silence regarding

---

be appropriately used to glean legislative intent. *See Almendarez-Torres v. United States,* 523 U.S. 224, 234 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947)) ("title of a statute and the heading of a section" are "tools available for the resolution of a doubt" about a statute's meaning); *Time Warner Cable v. Doyle,* 66 F.3d 867, 877 n.8 (7th Cir. 1995) (congressional intent can be interpreted from subtitle enacted as part of the statute, but not from subtitle added by a compiler or publisher); *see also* ECOA Amendments of 1975, Pub.L. No. 94-239, *reprinted in* 1976 U.S.C.C.A.N. 90 Stat. 251, 253-254.

an affirmative defense based on a violation of those regulations must be deemed significant." *Id.* Much as in *Southern Pacific,* the court is reluctant to grant the debtor "an implied remedy when the statutory scheme did not grant an express one." *Interstate Commerce Comm'n v. Transcon Lines,* 513 U.S. 138, 144 (1995).

The ECOA's plain language would seem to resolve the issue on its own. The court is not persuaded that invalidation of Ms. Camp's guaranties is "necessary to enforce" the ECOA in this case. 15 U.S.C. § 1691e(e). Invalidating Ms. Camp's guaranties under the ECOA would confer upon her, as a guarantor, a right Congress never intended to confer upon the principal debtor (the actual applicant), or even (as discussed above) a right that such a debtor would ever exercise. Such a debtor might have reason to use the court's equitable power to enjoin an ECOA violation or perhaps to seek specific performance of a credit extension, both traditional equitable powers, *see, e.g., Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. __, 122 S. Ct. at 713 ("specific performance might be available to enforce an agreement to lend money"), but this principal applicant would have no need of equity to invalidate a credit extension, something she wanted in the first place and something the ECOA was intended to protect, *see* 12 C.F.R. § 202.1(b) (purpose is "to promote the availability of credit to all creditworthy applicants without regard to ... marital status"), nor be otherwise entitled to avoid the obligation to pay that money back. The court is not the proper entity to confer on a guarantor, protected by the ECOA late in the game, a right not intended to be enjoyed by other "aggrieved applicants," especially when the guarantor never had any statutory rights in the ECOA's beginning.

Treating the ECOA as an affirmative defense to the guaranty's enforcement also would cause draconian results in this case. Invalidating the guaranties would cancel more than $1.25 million in debt, likely a far more valuable fight than the actual damages, $10,000 punitive damages (as capped), costs, and attorneys fees that Congress expressly provided. 15 U.S.C. § 1691e(a, b, d). In the eyes of one court, invalidating the debt is simply a "remedy too drastic for the court to implement simply by reading between the lines of the ECOA," and, had Congress intended the ECOA as an invalidating defense, it would have said so. *CMF Virginia Land v. Brinson,* 806 F. Supp. at 95. This case supports that view.

At least one federal court viewing the ECOA as a defense felt compelled to read out of the statute actual damages and attorneys fees, provisions Congress intentionally included. *See Integra Bank/Pittsburgh v. Freeman,* 839 F. Supp. at 330-331 ("the set of claims cognizable by way of recoupment is a limited one that excludes many of the 'actual damages' available under 15 U.S.C. § 1691e(d) ... [and] any claim defendant might make for attorney's fees under 15 U.S.C. § 1691e(d) lacks sufficient nexus with the underlying contract to be asserted by way of recoupment. This practice seems inconsistent with the purpose of statutory construction; a court should not read *into* the statute things that are not there, much less read *out* of the statute things that are.

With that said, the court still appreciates the compelling point that a creditor should not violate the law and then be allowed to benefit from the violation simply by waiting until the statute of limitations has passed. "To permit creditors—especially sophisticated credit institutions—to affirmatively benefit by disregarding the requirements of the ECOA would seriously undermine the Congressional intent to

eradicate gender and marital status based credit discrimination." *Id.* at 329; *accord Boone Nat. Savs. & Loan Ass'n v. Crouch,* 47 S.W.3d at 3761 ("If [the creditor] violated the act and its regulations by requiring [the debtor] to sign the guaranty contract, then it is clear that the guarantee would not exist in the absence of the violation."); *see also United States v. Western Pacific R.R. Co.,* 352 U.S. 59, 71 (1956) ("Only the clearest congressional language could force us to a result which would allow a [creditor] to recover unreasonable charges with impunity.").

To redress this problem under other federal statutes, courts have used the doctrine of equitable recoupment—touched upon briefly by the parties and the Missouri Supreme Court in *Crouch,* and asserted by Ms. Camp in the same affirmative defense claiming invalidation under the ECOA—to permit a debtor to reduce the creditor's damages so long as the debtor's claim arises out of the same transaction. *See, e.g., Reiter v. Cooper,* 507 U.S. 258, 263-64 (1993). First recognized in *Bull v. United States,* 295 U.S. 247, 262 (1935), recoupment is

> the right of a defendant, in the same action, to cut down the plaintiff's demand either because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes on him in the making or performance of that contract.

*Smith v. American Fin. Sys., Inc.,* 737 F.2d 1549, 1552 n.7 (11th Cir. 1984) (quoting BALLENTINE'S LAW DICTIONARY 1070 (3d ed. 1969)). Recoupment permits no excess recovery for the debtor, but reduces the creditor's claim by the debtor's damages. *See Myers v. Hurley Motor Co.,* 273 U.S. 18, 27 (1927).

In many ways, recoupment allows a debtor to assert a statutory right even though the statute of limitations has passed and barred his remedy—often his remedy of a civil cause of action for damages. So long as the plaintiff's action is timely, a defendant may raise a claim in recoupment even if he could no longer bring it independently, absent 'the clearest congressional language' to the contrary." *Beach v. Ocwen Fed. Bank,* 523 U.S. at 415 (quoting *Reiter v. Cooper,* 507 U.S. at 264) (citation omitted). The "ultimate question" is whether Congress intended that "the right shall be enforceable in any event after the prescribed time"—that is, whether the statute of limitations operates "to extinguish the right which is the foundation of the claim" or "merely to bar the remedy for its enforcement." *Id.* at 416 (quoting *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 358-359, 360 (1943)).

A "general principle of recoupment" applies in "other contexts," *Reiter v. Cooper,* 507 U.S. at 264-265, and, in the ECOA, Congress has not clearly said that the statute of limitations of 15 U.S.C. § 1691e(f) extinguishes both the remedy and the right. As with many typical statutes of limitation, the ECOA requires an "action" to be "brought" within a certain amount of time, and speaks therefore only of a suit's commencement, not of the right's duration.[12] *See id.*; *see also Beach v. Ocwen Fed. Bank,* 523 U.S. at 416 ("To be

---

[12] *Compare Beach v. Ocwen Fed. Bank,* 523 U.S. 410, 415 (1998) (finding that the right of rescission expired under Truth in Lending. Act after limitations period had run), and *Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Co.,* 628 F.2d 1023, 1027 (7th Cir. 1980) (preventing party who did not timely move to vacate arbitration award to assert grounds as affirmative defense to its enforcement, as statute required affirmative action within specific statute of limitations).

sure, a limitation provision may be held to be nothing more than a bar to bringing suit, even though its terms are ostensibly more ambitious than the language of the classic formulations."); *Distribution Servs., Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 811 (5th Cir. 1990) (permitting counterclaim by way of recoupment under Carriage of Goods by Sea Act though limitations period had passed).

This interpretation finds support in the same provision Ms. Camp attempts to use to invalidate the guaranties. Congress has not clearly said that ECOA rights expire with the running of the limitations period, *see United States v. Western Pacific R.R. Co.*, 352 U.S. at 71 (1956) (only the "clearest congressional language could force us to a result which would allow a [creditor] to recover unreasonable charges with impunity"), and has said that the court may grant equitable relief to enforce the ECOA's provisions, which, in, a case like this one, favors recoupment. 15 U.S.C. § 1691e(c). Recoupment "has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole." *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946). Moran has made its transactions the subject of its suit; recoupment is an equitable remedy, *Young v. United States*, __ U.S. __, 122 S. Ct. 1036, 1039 n. 1 (2002), and, in this case, "necessary to enforce" ECOA protections in those same transactions by permitting Ms. Camp to recoup those statutory damages, not to exceed Moran's claim (affirmative damages

would exceed the scope of recoupment), that the ECOA provides for violations she proves.[13] 15 U.S.C. § 1691e(c).

Other cases that read the ECOA as an affirmative defense rely on the concept of recoupment, and *Crouch*, the case the parties discuss on reconsideration, is no different. In Missouri, however, "recoupment — whether called a counterclaim or an affirmative defense — is solely a matter of defense." 47 S.W.3d at 374. Not so under federal law.[14] *See Reiter v. Cooper,* 507 U.S. at 264. Although asserted in a defensive posture - "by way of defense" - recoupment takes the form of a counterclaim, and it makes no difference that a defendant "may have mistakenly designated their counterclaims as defenses." *Reiter v. Cooper*, 507 U.S. at 263; *accord* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1275 (2d ed. 1990); *see also Bull v. United States*, 295 U.S.

---

[13] The court of appeals left room for this possibility under the Truth in Lending Act in an older case of recoupment, but without the necessary claim of being actually damaged. "We express no opinion concerning the availability of a counterclaim after the limitation period where debtors would seek to have the recovery by creditor reduced by the amount of actual damages sustained by debtors in, for example, overpayment of finance charges." *Basham v. Finance Am. Corp.*, 583 F.2d 918, 928 n. 16 (7th Cir. 1978) (also noting that TILA "was not designed, nor should it be used to thwart, the valid claims of creditors"). Ms. Camp claims, actual damages arising out of the very transactions in which Moran purportedly violated the ECOA.

[14] Indeed, recoupment has been largely (but not completely) superseded by the counterclaim provisions of the Federal Rules of Civil Procedure, now at times called the "ancestor" to the Rule 13 compulsory counterclaim. *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1440 (7th Cir. 1993); *see also O'Brien v. United States,* 766 F.2d 1038, 1048 (7th Cir. 1985).

at 262 ("recoupment is in the *nature of a defense* arising out of some feature of the transaction upon which the plaintiff's action is grounded") (emphasis added). The court should use the misdesignation provision in Rule 8(c) to treat recoupment as though properly designated as a claim, *Reiter v. Cooper*, 507U.S. at 263, and the court does so for Ms. Camp's recoupment defense.[15]

## III. Moran's Motion To Dismiss Declaratory Judgment Counterclaim

Moran Foods seeks dismissal of the defendants' declaratory judgment counterclaim, arguing that the court either lacks subject matter jurisdiction or ought to exercise its discretion to dismiss the claim for prudential reasons. The defendants contend that the meaning of the non-compete, clauses (and others) in the relevant license agreements remains at issue, and the declaratory judgment claim consequently has continuing vitality.

The Declaratory Judgment Act requires an "actual controversy" for the court to exercise jurisdiction. 28 U.S.C. § 2201(a); *see also Calderon v. Ashmus*, 523 U.S. 740, 745-746 (1998). This predicate to relief shadows the Article III case or controversy requirement, which prevents the statute from unconstitutionally expanding the court's federal jurisdiction. *See Aetna Life Ins. Co. v Haworth*, 300 U.S. 227, 239-240 (1937); *Harris Trust and Sv. Bank v. E-II*

---

[15] The court recognizes that a recoupment counterctaim under the ECOA might encourage debtors to rest on their laurels in the face of an affirmative action (perhaps less true for actual applicants than guarantors), but the policy against permitting creditors to benefit from their violation of the ECOA and the equitable policy of enforcing the ECOA, as it currently stands, overrides this concern.

*Holdings, Inc.*, 926 F.2d 636, 639-640 (7th Cir. 1991). The statute is not itself a source of jurisdiction and, even with jurisdiction unimpaired and the controversy requirement met, the statute merely confers discretion on the courts rather than an absolute right on litigants, empowering the court to dismiss a declaratory judgment action when inappropriate for a particular case. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995); *Nationwide Ins. v. Zavalis*, 52 F.3d 689, 692 (7th Cir. 1995).

In this case, the non-compete clauses at issue, by their express terms, lost their force and effect at most one year after termination of the license agreements and before this action began. An interpretation of those provisions now, when the stores purportedly governed by the non-competes have closed and the clauses have lost their effect, seems to lack "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The defendants, however request damages under other claims to which the substance of their declaratory judgment counterclaim relates, which suggests that perhaps the claim is not moot. *See, e.g., James Luterbach Constr. Co. v. Adamkus*, 781 F.2d 599, 602 (7th Cir. 1986).

In any event, the court in the exercise of its discretion finds declaratory relief in this case inappropriate. *See* Fed. R. Civ. P. 57 (reserving declaratory relief for "appropriate" cases); *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165, 1168 (7th Cir. 1969) (declaratory relief not appropriate when another traditional remedy is available). The cumulative nature of declaratory relief notwithstanding, the intentional interference with business relations and breach of contract claims in this case entail the very same interpretation of the non-compete clauses (and others) sought by declaration, but afford the defendants more effective and complete relief,

should the defendants prevail, and standing alone serve the interests of judicial economy, all counseling that this "remedial arrow in the district court's quiver" need not be drown. *Wilton v. Seven Falls Co.*, 515 U.S. at 289; *accord The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713, 717-718 (S.D. Ind. 1991), *modified on other grounds by* 796 F. Supp. 1164 (1992) (dismissing declaratory action because breach of contract claim involved the very same determination of breach).

## IV. Cross-Motions For Summary Judgment On ECOA Counterclaim

Susan Camp seeks partial summary judgment on her counterclaim alleging a violation of the Equal Credit Opportunity Act, 15 U.S.C, § 1691 *et seq.* Ms. Camp's motion focuses strictly on liability, not damages. She contends that Moran required her to execute a personal guaranty without justification, contravening the ECOA. Moran has since filed its own summary judgment motion, contending that the undisputed facts reveal Ms. Camp to have been a "joint applicant" and Mr. Camp not to have been independently creditworthy, which invoke exceptions to their liability under the ECOA.

> A motion for summary judgment should be granted where there is no genuine issue as to any material facts and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, "a trial court must view the record and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." To defeat a motion for summary judgment, the non-moving party cannot rest on the mere allegations or denials contained in his pleadings, but "must present

> sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial." However, neither presenting a scintilla of evidence nor the mere existence of some alleged factual dispute between the parties or some metaphysical doubt as to the material facts, is sufficient to oppose a motion for summary judgment. The party must supply evidence sufficient to allow a jury to render a verdict in his favor.

*Robin v. Espo Eng'g Corp.*, 200 F.3d at 1087-1088 (citations omitted). Except in special circumstances, the same standard applies to cross-motions for summary judgment. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341, 349 (7th Cir. 1983); *see also Eaton v. Onan Corp.*, 117 F. Supp.2d 812, 818 (S.D. Ind. 2000). The court considers each motion separately, imposing upon each movant the burden of supporting its motion and extending to each non-movant the benefit of any factual doubt—a "Janus-like perspective that sometimes forces the denial of both motions." *Buttitta v. City of Chicago*, 803 F. Supp. 213, 217 (N.D. Ill. 1992), *aff'd*, 9 F.3d 1198 (7th Cir. 1993).

Moran says ECOA claims should be analyzed like any other discrimination claims under the burden-shifting framework of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Not all circuits are in agreement, but "*McDonnell Douglas* was not intended to be a straightjacket into which every discrimination case must be forced kicking and screaming." *Latimore v. Citibank Fed. Savs. Bank*, 151 F.3d 712, 714 (7th Cir. 1998). Barring a basis for comparing a creditor's disparate treatment of similarly situated customers, *McDonnell-Douglas* doesn't apply to the credit discrimination context. *Id.* (rejecting the framework in ECOA case). The parties must therefore create a triable issue or justify summary

judgment through the conventional use of direct or circumstantial evidence of discrimination. *See id.* at 715; *see also Jiang v. Allstate Ins. Co.*, 199 F.R.D. 267, 271 (N.D. Ill. 2001).

The Federal Reserve Board enjoys the power to "prescribe regulations to carry out the purposes" of the ECOA. 15 U.S.C. § 1691b(a)(1). One such regulation, Regulation B, prohibits a creditor from requiring "the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standard of creditworthiness." 12 C.F.R. § 202.7(d)(1). The parties' evidence and arguments rise and fall on Regulation B.

Commentary interpreting § 202.7(d)(1) defines joint applicant as "someone who applies contemporaneously with the applicant for shared or joint credit" and not someone "whose signature is required by the creditor as a condition for granting the credit requested." 12 C.F.R. part 202, supp. I, ¶ 7(d)(1) (Official Staff Interpretation to § 202.7(d)(1)). An applicant becomes "joint" only by applying contemporaneously, not sequentially, and by having "some common interest in the credit requested." *Baybank v. Bornhofft*, 694 N.E.2d 854, 859 (Mass. 1998). The parties dispute whether Roger and Susan Camp were joint applicants.

The relationship between Moran Foods and the defendants began when Joe Higgs, Save-A-Lot's vice-president of finance since 1983, learned that Roger Camp sought to purchase an independently-owned (rather than corporately-owned) Save-A-Lot store in Lynchburg, Virginia. Mr. Higgs was responsible for ensuring the creditworthiness of persons endeavoring to open Save-A-Lot stores. He traditionally requested financial statements, and such a statement was submitted to Save-A-

Lot. The financial statement listed real estate and investments owned jointly by Roger and Susan Camp; of the $8.2 million in assets the statement listed, Mr. Camp estimated that Ms. Camp owned $2.5 million. Only Mr. Camp's name appeared on the statement and only he signed it, although he testified that he always put both his and Ms. Camp's name on financial statements to "make them accurate," causing him to question the authenticity of the financial statement at issue without her name listed.

Mr. Higgs made his creditworthiness determination based on the financial statement and Mr. Camp's success in having the transaction well in progress, an indication that the independent retailer selling the store apparently had approved Mr. Camp's credit. Mr. Higgs assumed that the financial statement was a joint statement of Roger and Susan Camp, though he didn't investigate the financial statement "to any large degree" because, if Mr. Camp had the wherewithal to purchase the current store and had experience in the grocery business, "he had the wherewithal to operate a Save-A-Lot store."

Save-A-Lot normally seeks a spouse's guaranty, though it has on occasion moved forward on a license without such an agreement. On August 13, 1997, the Camps signed a guaranty of the credit extended to the Save-A-Lot store in Lynchburg, Virginia. Six more guaranties followed, with both Camps signing: on April 3, 1998, two guaranties of credit for stores in Virginia and North Carolina; on March 25, 1998, one guaranty for credit to a store in Collinsville, Virginia; on December 28, 1998, one guaranty for a store in Ohio; and on January 11, 1999, two guaranties of credit extended to

Midwest Markets LLC.[16] Ms. Camp had no involvement in the management or operation of the grocery stores; she neither attended any board meetings or business meetings concerning the stores nor received any money from the stores' operations.

Construing the designated facts on each summary judgment motion in the light most favorable to the respective non-movants, both parties have submitted sufficient evidence to permit a reasonable jury to find, or not to find, that Moran violated the ECOA. Whether the Camps were joint applicants cannot be resolved by the court on the record before it, and whether Moran considered Mr. Camp independently creditworthy because of or despite the joint assets cannot be answered to say whether it was incumbent on Moran to conduct further inquiry into the Camps' jointly-held assets, *see* 12 C.F.R. part 202, supp. I, ¶ 7(d)(2) (Official Staff Interpretation to § 202.7(d)(2)), or whether the two actually were joint applicants, and Moran was allowed both signatures. *See Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. at 169.

Nor is it sufficiently clear that Moran "required" Ms. Camp's guaranty, *see* 12 C.F.R. § 202.7(d)(1) and part 202, supp. I, ¶ 7(d)(1), though Mr. Camp told his wife that Moran did. A reasonable jury, might say that Moran merely asked for the guaranty (language that predominates in Mr. Higgs's testimony), and consistent with Moran's practice to conduct further investigation and to allow a higher-up make the call to extend the credit anyway, might have allowed Ms. Camp not

---

[16] In the amended counterclaim filed on November 3, 2000, Ms. Camp alleges violations of only the last three guaranties.

to sign had she refused.[17] *See United States v. Meador*s, 753 F.2d 590, 593 (7th Cir. 1985) ("even when the creditor does require the signature of any creditworthy additional party, and the spouse accordingly elects to sign as such an additional party, he or she cannot later raise the ECOA as a defense"); 12 C.F.R. § 202.7(d)(5) ("The applicant's spouse may serve as an additional party, but a creditor shall not require that the spouse be the additional party.")

The parties' submissions do not resolve the joint applicant issue, either mandating a finding that Ms. Camp was a *de facto* joint applicant or that she wasn't. *See, e.g., Midlantic Nat. Bank v. Hansen*, 48 F.3d at 699 (spouse was joint applicant when financial statement relied upon assets held jointly and loan was intended to finance bank to be purchased jointly); *Riggs Nat. Bank of Washington v. Webster*, 832 F. Supp. at 151 (spouse was *de facto* joint applicant when financial statement submitted for loan relied upon properties owned jointly and properties owned only by spouse, and purpose of loan was to renovate building owned by spouse); *cf. Marine American State Bank v. Lincoln*, 433 N.W.2d 709, 711 (Iowa 1988) (spouses of applicants were neither officers nor shareholders in business and had no material participation in its activities); *American Security Bank v. York*, No. 96-CIV-6166, 1999 U.S. Dist. LEXIS 14309 (D.D.C. Sept. 1, 1992) (spouses had no ownership interest in business, the subject of the loan, and played no role in loan negotiations).

---

[17] Moran admitted in its answer to the defendants' counterclaim that Save-A-Lot "required Susan Camp to co-sign certain personal guaranties," but it is not clear from the pleadings or the record which guaranties this applies to, specifically whether it includes the three guaranties on which Ms. Camp has based her counterclaim and the four guaranties the subject of recoupment.

This case lies between these two sets of holdings and presents factual issues for a trial to sort out.[18]

## V. Moran's Motion For Summary Judgment On All Counterclaims

### *A. Intentional Interference with Contract, Business Relationship, or Business Expectancy*

Roundy's began supplying groceries to the defendants after Moran terminated the license, supply, and retail agreements. The defendants allege that Moran then intentionally interfered with this business relationship by threatening Roundy's with litigation, causing Roundy's to cease its grocery supply to the defendants. Moran contends that Roundy's terminated its relationship with the defendants not because of any threat of litigation, but because the defendants didn't pay for groceries that Roundy's supplied.[19]

---

[18] This determination leaves it unnecessary to address whether Moran violated the ECOA by requiring Ms. Camp's signature because of "jointly held property" or the guaranties' scope, altogether separate questions under the regulatory scheme from whether the Camps were joint applicants. The "jointly held property" provisions apply to a single applicant relying on joint property, not joint applicants relying on their shared property. *See* 12 C.F.R. § 202.7(d)(2) and part 202, supp. I, ¶ 7(d)(2).

[19] In the alternative, Moran says that the *Noerr-Pennington* doctrine protects its communication threatening litigation because the threat had objective legal merit and was not motivated by bad faith. *See Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Because summary judgment is appropriate based on the elements of the tortious interference claim, the court needn't address the *Noerr-Pennington* doctrine.

To sustain a claim for intentional interference with a business relationship or expectancy under Missouri law, the defendants must show (1) a contract or valid business relationship or expectancy, (2) Moran's knowledge of that contract or relationship, (3) a breach of the contract or relationship induced or caused by Moran's intentional interference, (4) the absence of justification, and (5) damages. *See Bell v. The May Dep't Stores Co.*, 6 S.W.3d 871, 876 (Mo. 1999); *Weicht v. Suburban Newspapers of Greater St. Louis, Inc.*, 32 S.W.3d 592, 598 (Mo. Ct. App. 2000).

In February 2000, Bruce VanOverloop, the chief operating officer for the defendant corporations, first explored the possibility of doing business with Roundy's and converting the former Save-A-Lot stores to More-For-Less stores. After establishing a line of credit, on April 21, Roundy's began supplying groceries to the defendants. On May 8, Moran, by counsel, sent a letter to Edward Kitz, Roundy's vice-president, secretary, and treasurer, threatening legal action unless Roundy's discontinued supplying groceries to the defendants in violation of certain non-compete clauses. Moran subsequently promised Roundy's that it would hold off on litigafion until May 31 while the parties investigated issues surrounding the non-competes, and promised to report back to Roundy's with the results of that investigation with plenty of lead time before instituting any legal action. Later, on May 23, Mr. Kitz says he received information from Roundy's accounting department that the defendants had not paid for their groceries and, based solely on this information, Roundy's terminated the supply to the defendants.

Nothing presented by the defendants rebuts Mr. Kitz's testimony. Although two individuals from Roundy's, John Curry and Mike Cristy (whose positions and authority are unknown), commented previously that the legal issue with

Moran was a problem and that the grocery supply could be discontinued if the problem wasn't resolved, no reasonable jury could conclude from this evidence that the litigation threat motivated Roundy's decision to terminate the relationship when that threat had lost its immediacy and in light of undisputed testimony from Roundy's officer that nonpayment alone precipitated that move.[20] Further, the summary judgment record would not allow a finding that the defendants made an evidentiary showing that Roundy's breached any agreement with the defendants, a prerequisite under Missouri law to hold Moran liable. *See Weicht v. Suburban Newspapers*, 32 S.W.3d at 598.

*B. Breach of Contract*

The defendants also allege that Moran breached each of the supply agreements by demanding payment of grocery debts and by terminating the agreements when the defendants failed to pay those debts; they also allege that Moran breached each of the retail accounting agreements by not providing "full" accounting services to the defendants. In the first instance, Moran contends that no breach occurred; in the second instance, Moran argues for reformation.

To demonstrate a breach of contract under Missouri law, the defendants must show (1) the existence of an enforceable

---

[20] The defendants also quote a phrase from a letter sent from Bill Ritchey to Roger Camp and interpret that phrase without having submitted the letter into evidence. It is well settled under Rule 56 that an affidavit as to the substance or interpretation of a written document is insufficient; the document "must be exhibited in full." *North Dakota State Univ. v. United States*, 255 F.3d 599, 607 (8th Cir. 2001); *see also Lukacs v. Kluessner*, 290 N.E.2d 125, 128 (Ind. Ct. App. 1972); Fed. R. Civ. P. 56(e).

agreement, (2) its terms, (3) a breach of the agreement, and (4) damages suffered because of the breach. *See Rice v. West End Motors Co.*, 905 S.W.2d 541, 542 (Mo. Ct. App. 1995). The court attempts to ascertain and to effectuate the parties intent as expressed in the plain language of the contract, absent any ambiguity, and the court presumes the words in the contract to hold their natural and ordinary meaning. *See Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 395 (Mo. 2001); *Bolton v. Bolton*, 950 S.W.2d 268, 271 (Mo. Ct. App. 1997).

Each supply agreement between Moran and the defendants states that "Buyer agrees to pay for all grocery items purchased from Moran in accordance with the payment policies established from time to time by Moran." Moran's payment policy required payments to be made the Wednesday following the week that invoices were published. Each supply agreement authorized Moran to terminate each agreement should the defendants not pay the amoiants due, so long as the termination occurred no sooner than ten days after Moran sent written notice. The court previously found that the defendants failed to pay their debts to Moran according to the agreements, and Moran sent written notice on March 17, 2000, well more than ten days before Moran terminated the agreements on April 3, 2000. Moran terminated the contracts because of nonpayment, and the defendants cannot premise a breach of contract claim on this termination.[21]

Nor can a breach of contract claim rest on termination of the license agreements between Moran and the defendants. Each license agreement permitted termination at any time the

---

[21] As explained previously in the court's discussion of prejudgment interest, the assessment of prejudgment interest didn't violate the agreements between defendants and Moran either.

licensees (the corporate defendants) defaulted under the license agreements or any other agreement with Moran, including "any supply agreement entered into between the parties." Moran justifiably terminated both the supply and license agreements because of the defendants' nonpayment of grocery bills.

The defendants also contend that Moran breached the retail accounting agreements by failing to provide "full" accounting services, which entailed accounts payable preparation and other related tasks. The retail accounting ageements between Mid-Atlantic and Moran, as well as Midwest and Moran, reflect the parties' consent to full accounting. Moran argues, however, that from the very beginning the defendants paid for only basic accounting services ($45 weekly instead of $80 weekly), and Moran provided only basic accounting services. A corporate defendants employee handled the accounting services contemplated by "full" accounting in-house, and the defendants never complained that Moran hadn't performed those services. Moran accordingly argues for reformation of the contract.

The court must enforce an agreement, neither make nor alter it; yet, the court has a duty to enforce the agreement actually made by the parties, and, when it appears that the parties made a mutual mistake in expressing the obligations to which they intended to be bound, the court has a duty to reform the written contract to reflect their agreement accurately. *See Kopff v. Economy Radiator Serv.*, 838 S.W.2d 449, 452 (Mo. Ct. App. 1992); *Duenke v. Brummet*, 801 S.W.2d 759, 765 (Mo. Ct. App. 1991). The party seeking reformation must show by "clear and convincing evidence" that the parties committed a mutual mistake, rather than a unilateral mistake, and "it must appear that both parties did what neither intended to do." *Kopff v. Economy Radiator*

*Serv.*, 838 S.W.2d at 452; *accord Sheinbein v. The First Boston Corp.*, 670 S.W.2d 872, 876 (Mo. Ct. App. 1984); *Urban Expansion, Inc. v. Fireman's Fund Ins. Co.*, 592 S.W.2d 239, 242 (Mo. Ct. App. 1979); RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981). Although parol evidence traditionally is inadmissible to construe an otherwise unambiguous contract, it is admissible in reformation actions to establish the fact of mutual mistake and the nature of the mistake to determine how to reform the writing to conform to the parties' intention. *See Duenke v. Brummett*, 801 S.W.2d at 766.

The two retail accounting agreements seem to reflect the parties' contract inaccurately. Undisputed parol evidence appears to demonstrate that both parties made the mutual mistake of expressing full accounting services in the agreements when actually the parties bought, provided, and received basic accounting services throughout their contractual relationship, and expected nothing different. The defendants never complained of the basic services provided by Moran, and, when Mr. Camp inquired into the issue, Moran confirmed that the defendant companies had been paying only for basic services.

Summary judgment is nevertheless improper. The defendants contend that, whether they contracted for full or basic accounting services, Moran did not timely prepare quarterly profit and loss statements, and Moran does not dispute that basic accounting services would include such statements. While Moran says the defendants have not suffered damages because of any breach, the defendants point to evidence that creates a genuine issue. Whether Moran provided the necessary accounting services and in an untimely manner so as to breach these two retail accounting agreements is consequently an issue for trial.

### *C. Fraud and Civil Conspiracy to Commit Fraud*

The defendants also allege that Moran induced the defendants to produce information to another Moran licensee—Lofino Food Stores—in a purported fraudulent scheme and conspiracy to damage defendants' three grocery stores in Dayton, Ohio. Moran argues that the defendants lack evidence on the elements of fraud and conspiracy to surpass summary judgment.

Under Missouri law, fraud consists of six elements: "(1) a false material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate injury." *Constance v. B.B.C. Dev. Co.*, 25 S.W.3d 571, 579 (Mo. Ct. App. 2000); *accord Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 720 (Mo. Ct. App. 1995). Failure to establish any of these elements is fatal to recovery. *See Heberer v. Shell Oil Co.*, 744 S.W.2d 441,443 (Mo. 1988) (en banc); *Nigro v. Research College of Nursing*, 876 S.W.2d 681, 686 (Mo. Ct. App. 1994).

A "civil conspiracy" is an agreement between individuals to commit an unlawful act or to use unlawful means to commit a lawful act. *Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 780-781 (Mo. 1999); *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. 1997). The conspirators must have "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," *Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d at 781 (quoting *Chmieleski v. City Products Corp.*, 660 S.W.2d 275, 290 (Mo. Ct. App. 1983)),

and must have committed at least one act in furtherance of the conspiracy, all resulting in damage to the claimant. *See Rice v. Hodapp,* 919 S.W.2d 240, 245 (Mo. 1996) (en banc).

Summary judgment is warranted. The defendants have not shown that Moran knowingly made a false material representation upon which the defendants relied to their detriment. The statements by Moran representatives that "perhaps" they could find interested buyers of defendants' stores or that Lofino Food Stores potentially had an interest in purchasing the stores have not been shown to be false; indeed, even the defendants admit that Moran appeared to conduct some sort of investigation into this possibility of interested buyers and that Lofino Food Stores inquired into their purchase and received information sent at defendants' direction. Even if generously interpreted as promises by Moran to orchestrate the purchase, the fraud claim fails because fraud cannot be based on mere promises. *See Emerick v. Mutual Benefit Life Ins. Co.,* 756 S.W.2d 513, 519 (Mo. 1988) (citing *Reed v. Cooke,* 55 S.W.2d 275 (Mo. 1932) (en banc)).

Moreover, nothing presented by the defendants shows an agreement between Moran and Lofino Food Stores to defraud the defendants, and the conspiracy claim regardless fails because of the insufficient evidence of fraud. *See Oak Bluff Partners, Inc. v. Meyer,* 3 S.W.3d at 781; *Rice v. Hodapp,* 919 S.W.2d at 245.

*D. Breach of Covenant of Good Faith and Fair Dealing*

The defendants' fifth counterclaim alleges that Moran Foods breached the implied covenant of good faith and fair dealing by terminating the supply agreements and demanding payment of past debts, thereby rendering the defendants'

performance impossible, by failing to provide full accounting services, by declining to continue with revised payment plans, and by discriminatorily refusing to make an exception for some of defendants' stores to carry special meat products.

"Missouri law implies a covenant of good faith and fair dealing in every contract." *Farmers' Elec. Coop., Inc. v. Missouri Dept. of Corrections,* 977 S.W.2d 266, 271 (Mo. 1998) (en banc). This duty requires a "party to a contract to cooperate with the other to enable performance and achievement of the expected benefits," *Slone v. Purina Mills, Inc.,* 927 S.W.2d 358, 368 (Mo. Ct. App. 1996), or, in other words, "prevents one party to a contract to exercise a judgment conferred by the express terms of the agreement in such a manner that evades the spirit of the transaction or denies the other party the expected benefit of the contract." *Acetylene Gas Co. v. Oliver,* 939 S.W.2d 404, 410 (Mo. Ct. App. 1996). The defendants must present "substantial evidence" that Moran "acted in bad faith or engaged in unfair dealing." *Id.*

The defendants argue that Moran denied them an expected contractual benefit by not permitting the South Boston and Wilson stores to carry and sell non-Sav-A-Lot meat products. The defendants submit evidence showing that when the defendants bought the stores, the stores already were selling the meat products at issue, and, when Moran insisted on their removal after the defendants purchased the stores, they were in fact removed, and sales dropped. The defendants contrast their situation with another Sav-A-Lot store (not owned by the defendants), which Moran allowed to sell other meat products.

The supply agreements governing these stores required the defendants to purchase all grocery items from Moran "except for such other items as may be specifically approved from

time to time in writing by Sav·A·Lot." Moran admits that it required the defendants to cease carrying the non-Sav-A-Lot products, but also says that it used established criteria in determining whether a particular retailer could carry non-Sav-A-Lot items, otherwise known as Direct Store Deliveries. Stores simply needed to request approval for items through a vendor list.

Although Mr. Camp raised this issue at a July 1999 meeting, the defendants set forth no evidence that they submitted a vendor list of non-Sav-A-Lot items for Moran's approval. Based on this record, no reasonable jury could say that Moran acted in bad faith or unfairly dealt with the defendants by doing precisely what the supply agreements allowed, without the proper request having been made to trigger Moran's cooperation and consideration of selling potentially competing meat products in the Sav-A-Lot stores. *See Acetylene Gas Co. v. Oliver,* 939 S.W.2d 404, 410 (Mo. Ct. App. 1996) (rejecting good faith and fair dealing claim when company followed its contract and sold products to retailers other than just the defendant).

Similarly, no reasonable jury could find that Moran violated its duty of good faith and fair dealing in terminating the contracts with the defendants and demanding that the defendants pay their past due amounts—a claim alleged in defendants' counterclaim but ostensibly abandoned on summary judgment. The contracts expressly gave Moran this right, and the duty of good faith and fair dealing would be taken to an untenable extreme by saying that Moran had to try to work with the defendants (more than it already had) before requesting the defendants to do what the contracts in fact required them to do. *See id.* Nor was there any violation because Moran discontinued payment plans; while the duty of

good faith and fair dealing contemplates cooperation, eventually enough is enough.

Although not mentioned in their pleadings, the defendants also say that Moran violated its duty of good faith and fair dealing by imposing a 22 percent late payment penalty and by trying to prevent Roundy's from supplying groceries to the defendants. The defendants may not "amend [their] complaint through arguments in [their] brief in opposition to a motion for summary judgment." *Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir. 1996); *accord Whitaker v. T.J. Snow Co.,* 151 F.3d 661, 664 (7th Cir. 1998). These arguments are not properly before the court. In any event, the defendants have shown no violation of good faith and fair dealing on the part of Moran for these two new allegations.

The defendants last contend that Moran breached its good faith and fair dealing obligations by not providing the accounting services contemplated in their retail accounting agreements. As already stated, the undisputed evidence shows that the parties bought, provided, and received basic accounting services throughout their contractual relationship, and apparently expected nothing different. The defendants never complained of the basic services that Moran provided, and when Mr. Camp inquired into the issue, Moran confirmed that the defendant companies had been paying only for basic services. The defendants cannot argue under the rubric of good faith and fair dealing that Moran denied them something that they never expected. *See Slone v. Purina Mills, Inc.,* 927 S.W.2d at 368 (claim concerned with "expected benefits").

In addition, this contention is merely a restatement of the defendants' breach of contracts claim, for which nothing within their agreements need be implied. *See Halls Ferry Inv., Inc. v. Smith,* 985 S.W.2d 848, 853 (Mo. Ct. App. 1998);

*Acetylene Gas Co. v. Oliver,* 939 S.W.2d at 410. Summary judgment on the good faith and fair dealing counterclaim is proper.

*E. Missouri's Franchise Statute*

The defendants also say that Moran violated Missouri's franchise statute, MO. REV. STAT. § 407.405, by failing to provide notice ninety days before terminating the agreements. Moran concedes for summary judgment purposes that the defendant companies were "franchises" within the meaning of the statute, but contends that notice was not required because the defendant corporations were insolvent, which is an exception under the statute:

> No person who has granted a franchise to another person shall cancel or otherwise terminate any such franchise agreement without notifying such person of the cancellation, termination or failure to renew, except that when criminal misconduct, fraud, abandonment, bankruptcy or *insolvency of the franchise,* or the giving of a no account or insufficient funds check is the basis or grounds for cancellation or termination, the ninety days' notice shall not be required.

MO. REV. STAT. § 407.405 (emphasis added). Since this statute is remedial in nature, it is to be given a broad application. See *C&J Delivery, Inc. v. Emery Air Freight Corp.,* 647 F. Supp. 867, 871 (E.D. Mo. 1986).

Missouri courts consistently define insolvency as the "inability to pay debts as they become due in the ordinary course of business." *Lueckenotte v. Lueckenotte,* 34 S.W.3d 387, 398 (Mo. 2001); *Adams v. Richardson,* 337 S.W.2d 911,

916 (Mo. 1960); *see also Finn v. Meighan,* 325 U.S. 300, 303 (1945) ("inability of the debtor to pay his debts as they mature"). The defendants respond that their ability to pay is shown by their having begun paying their debts each week in full, including overpayments, with Moran approving that amount on a weekly basis. The summary judgment record also shows that, though the defendants made some payments, the debt continued to grow—for example, from September 1999 to March 2000, from roughly $800,000 to $1.3 million.

The defendants' failure to pay for groceries in accordance with their written agreements' terms was "a practical demonstration of [their] inability pay [their] debts as they matured." *A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co.*, 95 F.2d 703, 708 (8th Cir. 1938); *accord Seigfried v. The Chicago, Burlington, and Quincy R.R. Co.*, 126 S.W. 798, 799 (Mo. Ct. App. 1910) ("and of this inability the failure to pay one just and admitted debt would probably be sufficient"). The defendants admitted the debt due to Moran, *F. H. Smith Co. v. Louisville & Nashville R.R. Co.*, 137 S.W. 890, 892 (Mo. Ct. App. 1911) (failure to pay shows inability when debt is admitted), but they were not financially able to pay, except in a manner that continued to let the debt grow larger. This hardly shows an ability to pay the admitted debt, and the defendants present no evidence of assets or earnings that would tend to show otherwise.[22] *See Lueckenotte v. Lueckenotte,* 34 S.W.3d at 398 (examining insolvency by looking at earnings and expenses). Moran was not required to

---

[22] The defendants have not argued that a failure to pay would be semantically or meaningfully different than an inability to pay under Missouri's franchise statute. Arguing their ability but failure to pay would, of course, place them in a difficult position in this case.

provide ninety days' notice before termination, *see* MO. REV. STAT. § 407.405, so summary judgment is appropriate.

*F. Promissory Estoppel*

Moran argues that a promissory estoppel claim is largely inappropriate because the supply, payment, and retail accounting agreements govern its relationship with the defendants. None of the parties contest the binding nature of these agreements, and a promissory estoppel claim is an inappropriate remedy when existing binding agreements control the dispute. *See Resnik v. Blue Cross and Blue Shield of Missouri,* 912 S.W.2d 567, 573 (Mo. Ct. App. 1995).

To avoid this limitation, the defendants contend that Moran agreed to a revised payment plan and, under that plan, promised to continue providing groceries to permit the continued operation of the grocery stores in exchange for overnight wire payments of current bills and a portion of the outstanding debt. The defendants say they relied on these weekly promises to their detriment when Moran decided to terminate their supply relationship. Moran assumes for the sake of argument that it actually made promises in extra-contractual fashion.

In Missouri, promissory estoppel, one form of equitable estoppel, arises from a party's representation upon which another party reasonably relies to his detriment and which justice requires to be enforced. *See Zipper v. Health Midwest,* 978 S.W.2d 398, 411 (Mo. Ct. App. 1998); *Resnik v. Blue Cross and Blue Shield,* 912 S.W.2d 567, 572-573 (Mo. Ct. App. 1995). The elements of promissory estoppel occasionally have been outlined in traditional manner and occasionally in the general form of equitable estoppel, the former "not fully explain[ing] the estoppel cause of action" but more

"instructive" than the latter formulation.[23] *Resnik v. BCBS,* 912 S.W.2d at 573. Under either formulation, promissory estoppel "is not a favorite of the law and will not be applied lightly" without "clear and satisfactory evidence." *Farmland Indus., Inc. v. Bittner,* 920 S.W.2d 581, 583 (Mo. Ct. App. 1996).

The defendants haven't met their summary judgment burden. Although a reasonable jury might see Moran's termination as inconsistent with its earlier promise, *see Resnik v. BCBS,* 912 S.W.2d at 573 (promise must be inconsistent with a party's later actions or a promise that the party later denies), no reasonable jury could say on this record that the defendants relied on this promise to their detriment. The defendants present no evidence that they could have brought their accounts current, even, as they suggest, by obtaining financing from another source to salvage the businesses.

---

[23] In many cases, Missouri courts list the elements of promissory estoppel as "(1) a promise, (2) detrimental reliance on the promise, (3) the promisor should have or did foresee the reliance, and (4) injustice can be avoided only by enforcement of the promise." *Resnik v. BCBS,* 912 S.W.2d at 573 (quoting *Townes v. Howe, Inc.,* 852 S.W.2d 359, 361 (Mo. Ct. App. 1993)). The traditional formulation of equitable estoppel, which derives from the Missouri Supreme Court's decision in *Peerless Supply Co. v. Industrial Plumbing and Heating Co.,* 460 S.W.2d 651, 666 (Mo. 1970), is "(1) an admission, statement or act inconsistent with a claim afterwards asserted or sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act." As *Resnik* explains, the distinction is sometimes important because by "following the Townes elements rather than the Peerless elements we have traded a longer, more tedious definition for a mere concise but less instructive version." *Resnik v. BCBS,* 912 S.W.2d at 573.

Nothing shows that they would have closed the stores and stopped selling groceries. The defendants' condition remained essentially one of indebtedness, with the defendants in debt when Moran made its promises and when it terminated their relationship. The record bears out no change in position that would show the defendants' detrimental reliance on Moran's promises. *See, e.g., Midwest Energy, Inc. v. Orion Food Sys., Inc.*, 14 S.W.3d 154, 165 (Mo. Ct. App. 2000) (no actual reliance without a material change of position). Nor would any alleged reliance have been reasonable without Moran's promise not to exercise its contractual right to terminate the relationship.[24]

### *G. Accounting Malpractice*

The defendants next allege that Moran "breached a professional duty owed to Midwest and Mid-Atlantic to provide full accounting services, a duty imposed by contract...and by professional accounting standards."[25] The defendants focus on Moran's failure to provide quarterly financial reports for three full quarters in 1998.[26] According

---

[24] Although not discussed by the parties, this seems not to be a case in which injustice can be avoided only through the promise's enforcement.

[25] The retail accounting agreements contain no choice of law provision, but Moran argues that the court should continue to apply Missouri law to this issue. The defendants do not challenge this position. Accordingly, the court continues to apply Missouri law.

[26] For this reason, the court needn't return to the issues of whether the retail accounting agreements contemplated full or basic accounting services or whether reformation of the contract is appropriate because Moran concedes that basic accounting services

to the defendants, because they never received these reports, they could not properly assess the financial health of their southern stores and, for that reason, purchased additional stores in 1998 and continued operations in 1999 without realizing the extent of the indebtedness.

In addition to the other elements of a professional negligence action, *see, e.g., Bray v. Brooks,* 41 S.W.3d 7, 15 (Mo. Ct. App. 2001) (listing traditional negligence elements), the defendants must show that Moran's accountants breached their accounting duties by failing "to use the degree of skill and learning ordinarily used by members of the accounting profession." *Deutsch v. Wolff,* 994 S.W.2d 561, 571 (Mo. 1999). Expert testimony is required "to establish professional negligence where the issues in the case involve matters outside the common experience and knowledge of laypersons." *Stalcup v. Orthotic & Prosthetic Lab, Inc.,* 989 S.W.2d 654, 657 (Mo. Ct. App. 1999) (medical malpractice); *accord Deutsch v. Wolff,* 994 S.W.2d at 570-571 (accounting malpractice); *Annen v. Trump,* 913 S.W.2d 16, 19-20 (Mo. Ct. App. 1995) (engineering malpractice).

The defendants have not designated any expert testimony to establish a *prima facie* case of accounting malpractice other than the initial report (a letter) of John Frizzo, a certified public accountant, filed on July 20, 2001.[27] *See Deutsch v.*

---

would include these quarterly financial reports.

[27] On September 28, 2001, the defendants filed a more expansive report from John Frizzo, but they do not designate this evidence in opposition to summary judgment, so the court does not consider it today. In any event, on the issue of providing timely financial reports, Mr. Frizzo appears to rely largely on Moran's expert, Gary Kleinrichert.

*Wolff,* 994 S.W.2d at 571 (noting that a CPA is a "sufficient expert" for accounting malpractice actions). Ignoring the timeliness of Mr. Frizzo's July 20 report for the moment, a point Moran initially contests, the report contains no conclusion that Moran failed to meet generally accepted accounting standards in this case. *See id.* The letter largely speaks hypothetically of accounting standards or problems, but says nothing of Moran's specific failures. This dearth of expert testimony would leave the jury to guess not only about the standards Moran purportedly violated, but the damages the defendants actually incurred. An issue is not "genuine" when it consists of mere speculation or conjecture. *See Rice v. Hodapp,* 919 S.W.2d 240, 243 (Mo. 1996).

The propriety of summary judgment on this claim is underscored by Moran's designated expert testimony left otherwise unrebutted. Gary Kleinrichert, a partner with Arthur Andersen LLP and a certified public accountant, explained the delay (accuracy never being an issue) in quarterly reports, particularly the second and third quarters of 1998, by concluding that the defendants hadn't provided the necessary information in a timely manner, nor was the information at times provided complete, legible, or in the required form. In short, according to Mr Kleinrichert, Moran did the best it could with what it got. While triable issues might remain as to whether Moran breached the retail accounting agreements, Mr. Kleinrichert's opinion makes clear that Moran's conduct did not rise to level of violating professional accounting standards, so summary judgment is appropriate on this claim.

*H. Breach of Agency Relationship*

The defendants also allege that Moran became their agent in promoting the sale of their seven stores to two other Sav-A-Lot licensees, and then breached that agency relationship.

Moran argues that no agency relationship was ever formed and, even assuming such a relationship, no breach of fiduciary duty ever occurred.

Under Missouri law, creation of an agency relationship presupposes three things: (1) that the agent "holds a power to alter legal relation between the principal and third persons and between the principal and himself," (2) that the agent "is a fiduciary with respect to matters within the scope of his agency," and (3) that "the principal has the right to control the conduct of the agent with respect to matters entrusted to him." *Capitol Indemnity Corp. v. Citizens Nat. Bank of Fort Scott,* 8 S.W.2d 893, 903 (Mo. Ct. App. 2000) (quoting *State ex rel. Bunting v. Koehr,* 865 S.W.2d 351, 353 (Mo. 1993) (en banc)). "The absence of any one of these elements defeats the claim of agency." *Id.*

The defendants are unable to point to anything in the summary judgment record that creates a triable issue on whether the parties ever formed an agency relationship or that Moran breached such a purported relationship. The summary judgment record contains no evidence that the defendants had the power to control or direct the otherwise gratuitous attempts to identify potential buyers of defendants' stores, *see Lucas v. Enkvetchakul,* 812 S.W.2d 256, 261 (Mo. Ct. App 1991) (describing this as the "critical element"), nor is there any indication that the defendants endowed Moran with the power to alter legal relations between the defendants and third parties. The defendants characterize Moran's conduct as "acting in its own best interest," exactly contrary to the necessary showing of acting on behalf of a principal. Since the defendants' burden is unsatisfied, summary judgment is proper. See *Capitol Indemnity Corp. v. Citizens Nat. Bank of Fort Scott,* 8 S.W.2d at 903.

## VI. CONCLUSION

For the foregoing reasons, the court:

(1) GRANTS IN PART and DENIES IN PART Moran Foods' motion for clarification and reconsideration, awarding damages and prejudgment interest, but denying at this time the request for attorneys fees and costs, [Docket No. 130];

(2) DENIES the defendants' motion to reconsider, though clarifying its position on the Equal Credit Opportunity Act [Docket No. 144];

(3) DENIES Susan Camp's motion for partial summary judgment [Docket No. 175];

(4) GRANTS Moran Foods' motion to dismiss the defendants' declaratory judgment counterclaim [Docket No. 177];

(5) GRANTS IN PART and DENIES IN PART Moran Foods' motion for summary judgment, leaving issues under the defendants' breach of contract and Equal Credit Opportunity Act claims [Docket No. 181]; and

(6) DENIES the defendants' request for a hearing as the parties' submissions ably assist the court in deciding these matters [Docket No. 148].

SO ORDERED.

ENTERED: April 26, 2002

/s/
Robert L. Miller, Jr., Judge
United States District Court

---

## APPENDIX F

---

## TITLE 15. COMMERCE AND TRADE
## CHAPTER 41. CONSUMER CREDIT PROTECTION
## EQUAL CREDIT OPPORTUNITY

### 15 U.S.C.S. § 1691. Scope of prohibition

(a) Activities constituting discrimination. It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction--

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

* * *

## TITLE 12 -- BANKS AND BANKING
## CHAPTER II -- FEDERAL RESERVE SYSTEM
## SUBCHAPTER A -- BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
## PART 202 -- EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)
## REGULATION B (EQUAL CREDIT OPPORTUNITY)

### 12 C.F.R. § 202.2 Definitions.

For the purposes of this regulation, unless the context indicates otherwise, the following definitions apply.

* * *

(e) Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

* * *

**12 C.F.R. § 202.7 Rules concerning extensions of credit.**

* * *

(d) Signature of spouse or other person -- (1) Rule for qualified applicant. Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

(2) Unsecured credit. If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

(3) Unsecured credit -- community property states. If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to community property.

(4) Secured credit. If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) Additional parties. If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

(6) Rights of additional parties. A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section.

* * *

(2)

No. 06-1623

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

MID-ATLANTIC MARKET DEVELOPMENT COMPANY, LLC., *et al.*,

*Petitioners*,

*v.*

MORAN FOODS, INC.
d/b/a SAVE-A-LOT, LTD.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION

MICHAEL A. WILKINS
*Counsel of Record*
DONALD M. SNEMIS
BRIAN E. BAILEY
ICE MILLER LLP
One American Square
Suite 3100
Indianapolis, IN 46282-0200
(317) 236-2395
(317) 592-4793 fax

*Counsel for Respondent*

210659

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

I. Did the Seventh Circuit correctly decide that SAL committed no act of credit "discrimination" under the Equal Credit Opportunity Act by requesting that Susan Camp and her husband Roger both execute personal guaranties for the extension of credit to Roger's business, when the Financial Statement submitted for credit approval reflected the net worth of both Roger and Susan and SAL knew that it included jointly owned assets?

II. Under the ECOA, did SAL's request that Susan Camp execute a personal guaranty void that very guaranty as soon as it was executed?

## LIST OF PARTIES (RULE 14.1(b) STATEMENT)

A list of all parties to the proceeding in the court whose judgment is the subject of the Petition is as follows:

Defendants-Appellees and Petitioners: Mid-Atlantic Market Development Company, LLC, Midwest Markets, LLC, Roger V.S. Camp, and Susan Camp.

Plaintiff-Appellant and Respondent: Moran Foods, Inc. d/b/a Save-A-Lot, Ltd.

## RULE 29.6 DISCLOSURE STATEMENT

SUPERVALU, Inc. is the sole parent corporation of Respondent Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. No publicly held company owns 10% or more of SUPERVALU, Inc.'s stock.

## TABLE OF CONTENTS

*Page*

QUESTIONS PRESENTED ..... i

LIST OF PARTIES (RULE 14.1(b) STATEMENT) . ii

RULE 29.6 DISCLOSURE STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF CITED AUTHORITIES ..... v

STATUTES AND REGULATIONS INVOLVED ... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE PETITION ..... 4

1. No court has ruled on the validity of the Federal Reserve Board's action, so there is no conflict in decisional law to be resolved. ..... 4

2. The Seventh Circuit correctly determined that SAL committed no "credit discrimination" against Susan Camp. ..... 9

3. There is no conflict between the Seventh Circuit's decision and any other court on the use of the ECOA as an affirmative defense. ..... 12

*Contents*

*Page*

4. Susan Camp had no private right of action under the ECOA to assert either a counterclaim for recoupment or an affirmative defense. ..... 16

CONCLUSION ..... 22

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am., Div. 998 v. Wis. Employment Relations Bd.*, 340 U.S. 416 (1951) ..... 12

*Baybank v. Bornhofft*, 694 N.E.2d 854 (Mass. 1998) ..... 6, 7, 17

*Boag v. MacDougall*, 454 U.S. 364 (1982) ..... 9

*Bolduc v. Beal Bank, SSB*, 167 F.3d 667 (1st Cir. 1999) ..... 13

*Cadle Co. v. Vargas*, 771 N.E.2d 179 (Mass. App. Ct. 2002) ..... 6

*Capitol Indem. Corp. v. Aulakh*, 313 F.3d 200 (4th Cir. 2002) ..... 16

*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ..... 19

*CMF Va. Land, L.P. v. Brinson*, 806 F. Supp. 90 (E.D. Va. 1992) ..... 13, 21

*Diamond v. Union Bank & Trust*, 776 F. Supp. 542 (N.D. Okla. 1991) ..... 13

*Cited Authorities*

*Page*

*Douglas County Nat'l Bank v. Pfeiff*,
809 P.2d 1100 (Colo. Ct. App. 1991) ..... 6

*FDIC v. 32 Edwardsville, Inc.*,
873 F. Supp. 1474 (D. Kan. 1995) ..... 13

*FDIC. v. Medmark, Inc.*,
897 F.Supp. 511 (D. Kan. 1995) ..... 6

*FDIC v. Skotzke*,
881 F. Supp. 364 (S.D. Ind. 1994) ..... 13

*Flood v. Kuhn*,
407 U.S. 258 (1972) ..... 8

*Halbert v. Michigan*,
545 U.S. 605 (2005) ..... 9

*Hammons v. Ehney*,
924 S.W.2d 843 (Mo. 1996) ..... 6

*Haynie v. Veneman*,
272 F. Supp. 2d 10 (D.D.C. 2003) ..... 16

*Integra Bank/Pittsburgh v. Freeman*,
839 F. Supp. 326 (E.D. Pa. 1993) ..... 6

*Mayes v. Chrysler Credit Corp.*,
37 F.3d 9 (1st Cir. 1994) ..... 17

*Cited Authorities*

*Page*

*Mayes v. Chrysler Credit Corp.*,
167 F.3d 675 (1st Cir. 1999) ..... 13

*Resolution Trust Corp. v. Schonacher*,
844 F. Supp. 689 (D. Kan. 1994) ..... 13

*Riggs Nat'l Bank of Washington, D.C. v. Linch*,
829 F. Supp. 163 (E.D. Va. 1993), *aff'd*, 36 F.3d
370 (4th Cir. 1994) ..... 13

*Riggs Nat'l Bank of Washington, D.C. v. Linch*,
36 F.3d 370 (4th Cir. 1994) ..... 9, 10, 11

*Seminole Tribe of Florida v. Florida*,
517 U.S. 44 (1996) ..... 5

*Silverman v. Eastrich Multiple Investor Fund, L.P.*,
51 F.3d 28 (3d Cir. 1995) ..... 5, 6

*S. Pac. Transp. Co. v. Commercial Metals Co.*,
456 U.S. 336 (1982) ..... 14

*Sw. Pa. Reg'l Council, Inc. v. Gentile*,
776 A.2d 276 (Pa. Super. Ct. 2001) ..... 6, 11

*Stern v. Espirito Santo Bank of Florida*,
791 F. Supp. 865 (S.D. Fla. 1992) ..... 6

*Still v. Cunningham*,
94 P.3d 1104 (Alaska 2004) ..... 6

*Cited Authorities*

*Page*

*Stornawaye Properties, Inc. v. Moses*,
76 F. Supp. 2d 607 (E.D. Pa. 1999) ..... 6

**Statutes:**

15 U.S.C.A. § 1691 (West 1998) ..... 16

15 U.S.C.A. § 1691a(b) (West 1998) ..... 1, 17, 19

15 U.S.C.A. § 1691b (West 1998) ..... 16

15 U.S.C.A. § 1691c (West 1998) ..... 16

15 U.S.C.A. § 1691d (West 1998) ..... 16

15 U.S.C.A. § 1691e (West 1998) ..... 1, 14, 17

**Regulations and regulation commentary:**

12 C.F.R. § 202 (2005) ..... 6

12 C.F.R. § 202.2(e) (1985) ..... 1, 5, 17

12 C.F.R. § 202.2 (e) (1997) ..... 2

12 C.F.R. § 202.7(d) ..... 9

12 C.F.R. § 202.7(d)(1) (1997) ..... 7, 20

*Cited Authorities*

*Page*

12 C.F.R. pt. 202, supp. I, para. 7(d)(1) (1997) .... 20

Revision of Regulation B, 50 Fed. Reg. 48018 (Nov. 20, 1985) ..... 5-6, 18

**Rule:**

Sup. Ct. R. 10 ..... 9

**Other Authorities:**

Andrew B. Lustigman & Alicia M. Serfaty, *The Equal Credit Opportunity Act as a Defense Against Payment: How Lenders Can Strike Back*, 111 Banking L.J. 444, 444 (1994) ..... 21

Mary Dee Pridgen, *Consumer Credit and the Law* § 3:4 (2004) ..... 21

## STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth as follows:

**15 U.S.C.A. § 1691a(b) (West 1998):**

> (b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

**15 U.S.C.A. § 1691e(a) (West 1998):**

> (a) Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

**12 C.F.R. § 202.2(e) (1985):**

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit other than a guarantor, surety, endorser, or similar party.

**12 C.F.R. § 202.2(e) (1997):**

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of §202.7(d), the term includes guarantors, sureties, endorsers and similar parties.

## STATEMENT OF THE CASE

Respondent Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. (hereinafter "SAL") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*, 476 F.3d 436 (7th Cir. 2007). For purposes of this response, SAL incorporates that decision's statement of the facts with the following additional facts relevant to application of the Equal Credit Opportunity Act (hereinafter "ECOA"). Roger Camp testified that the Financial Statement he submitted to SAL for an extension of credit to his businesses accurately reflected both his and his wife Susan's net worth—not just his own. (Supp. App. 5.)[1] He admitted that "a substantial number of the assets" on the Financial Statement "were owned solely or partly by Mrs. Camp." (Supp. App. 10.) The extent of Susan Camp's ownership of assets on the Financial Statement, which showed a net worth of $6.7 million, is as follows:

---

[1] All citations to "Supp. App." are to the Supplemental Appendix filed with the Seventh Circuit as a part of Moran's Appellant's Reply Brief and Response on Cross-Appeal.

| | |
|---|---|
| $775,000 | Home in Granger, Indiana purchased and owned solely by Susan |
| $745,000 | Home in Valparaiso, Indiana jointly owned |
| $315,000 | Home in Manitou Beach, Michigan jointly owned |
| $40,000 | Trust Estate, 2034 Marsh Dr., Manitou Beach, Michigan owned solely by Susan |
| $1,103,000 | A collection of stock, bonds, and funds most of which were owned solely by Susan Camp or jointly owned |
| $1,500,000 | Securities in MM Development Company, LLC, a company in which Susan was a partner, were jointly owned |
| $145,000 | Jewelry owned solely by Susan or jointly owned |
| $135,000 | Antiques jointly owned |
| $85,000 | Automobiles jointly owned |
| $393,000 | Personal assets such as a boat and furniture, most of which were jointly owned |

(App. 125-27[2]; Supp. App. 4-10.) It was undisputed that SAL believed that the Financial Statement included assets that were jointly owned by Susan Camp. (Supp. App. 10, 16.)

---

[2] All citations to "App." are to Moran's Appellant's Appendix filed with the Seventh Circuit.

## REASONS FOR DENYING THE PETITION

The Seventh Circuit's decision is correct and does not conflict with any decision of this Court, any other court of appeals, or any other state or federal court.

### 1. No court has ruled on the validity of the Federal Reserve Board's action, so there is no conflict in decisional law to be resolved.

The Seventh Circuit issued no holding regarding the Federal Reserve Board's authority to extend the ECOA's definition of "applicant" to guarantors of credit. Rather, the Seventh Circuit merely expressed skepticism about it in dicta: "We doubt that the statute can be stretched far enough to allow this interpretation." (Petition, at 10a: *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007).)[3] What the court of appeals had no uncertainty about, however, was Susan Camp's failure to prove discrimination. (Petition, at 11a: *Moran*, 476 F.3d at 441.) That is the firm and unequivocal reason Susan Camp lost her ECOA claim. The Seventh Circuit made it clear that its discussion of the Board's authority was merely academic: "But even if the Federal Reserve Board's interpretation is authorized, Susan Camp *must lose* because she failed to prove discrimination." (Petition, at 11a: *Moran*, 476 F.3d at 441 (emphasis added).)

The court of appeals' commentary on the Federal Reserve Board's interpretation of "applicant" was neither a "result" of the case nor a "portion[] of the opinion necessary to" the

[3] All citations to the "Petition" are to the Petition for Writ of Certiorari.

result reached. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996). It is *obiter dictum*. *Id.* The holding, on the other hand, is that Susan Camp "must lose" on her claim for failure to prove discrimination.

The Camps acknowledge the absence of a conflict between holdings of the Seventh Circuit and other federal courts. They admit "the Seventh Circuit stopped short of explicitly ruling that the Federal Reserve Board exceeded its authority in including guarantors within the definition of 'applicant.'" (Petition, at 6.) Nonetheless, the Camps claim that "statements" in the Seventh Circuit's opinion conflict with the Ninth Circuit's decision in *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3d Cir. 1995). (Petition, at 6-7.) Beyond this assertion the Camps give no explanation of the alleged conflict.

A review of *Silverman* reveals no conflict. Whereas the Seventh Circuit expressed some doubt about the Board's interpretation of the term "applicant" to include a guarantor, the validity of that interpretation was never even mentioned in *Silverman*. There, both the creditor and the debtor assumed the validity of the Board's interpretation; they disputed only the timing of its applicability. *Silverman*, 51 F.3d at 30-31 ("The parties' dispute on this issue stems from the two dates provided in the [Federal Reserve Board's] amendment . . . ."). The Board's initial interpretation of the term "applicant" specifically *excluded* guarantors. 12 C.F.R. § 202.2(e) (1985), *quoted in Silverman*, 51 F.3d at 31. The Board later revised this interpretation to specifically *include* a guarantor. This revision became effective December 16, 1985, but creditors had the option of complying with the current regulation and existing interpretations, which would remain in effect until October 1, 1986. Revision of Regulation

B,[4] 50 Fed. Reg. 48018 (1985), *quoted in Silverman*, 51 F.3d at 31. Between the revised regulation's effective date (December 16, 1985) and the mandatory compliance date (October 1, 1986), the guarantor in *Silverman* signed the guaranty. The parties disputed whether the new or the old interpretation of "applicant" applied to the guaranty. The Ninth Circuit held that the new, revised interpretation applied because the "expanded definition of 'applicant' was immediately effective as of December 16, 1985." *Silverman*, 51 F.3d at 31.

However, the Ninth Circuit did not rule on, review, discuss, or even allude to the validity of the Board's "expanded definition" of applicant and its creation of a private right of action for guarantors. The validity of the Board's regulation was taken for granted. The same is true in all but one of the five federal district court and five state court cases cited in the Camps' Petition in support of their argument for the existence of a conflict.[5] (Petition, at 7.) None of those cases addresses the authority of the Board to expand Congress's definition of applicant to include "guarantors."

---

[4] The Federal Reserve Board has entitled its collection of regulations under the ECOA as "Regulation B." *See* 12 C.F.R. pt. 202 (2005) ("Equal Credit Opportunity Act (Regulation B)").

[5] *Stornawaye Properties, Inc. v. Moses*, 76 F. Supp. 2d 607 (E.D. Pa. 1999); *FDIC v. Medmark, Inc.*, 897 F. Supp. 511 (D. Kan. 1995); *Integra Bank/Pittsburgh v. Freeman*, 839 F. Supp. 326 (E.D. Pa. 1993); *Stern v. Espirito Santo Bank of Florida*, 791 F. Supp. 865 (S.D. Fla. 1992); *Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004); *Cadle Co. v. Vargas*, 771 N.E.2d 179 (Mass. App. Ct. 2002); *Sw. Pa. Reg'l Council, Inc. v. Gentile*, 776 A.2d 276 (Pa. Super. Ct. 2001); *Baybank v. Bornhofft*, 694 N.E.2d 854 (Mass. 1998); *Hammons v. Ehney*, 924 S.W.2d 843 (Mo. 1996); *Douglas County Nat'l Bank v. Pfeiff*, 809 P.2d 1100 (Colo. Ct. App. 1991).

Only one of those cases, *Baybank v. Bornhofft*, 694 N.E.2d 854, 858 (Mass. 1998), mentioned a concern with the Federal Reserve Board's Regulation B, but not the provision at issue here. In *Baybank*, the mother of a borrower co-signed a promissory note for $440,000. The Court reviewed section 202.7(d)(1) of Regulation B, which prohibits a creditor from requiring "the signature of an applicant's spouse *or other person*, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1) (emphasis added), *quoted in Baybank*, 694 N.E.2d at 857. In the view of the Supreme Judicial Court of Massachusetts, "[f]orbidding a creditor from requiring the signature of *any* additional person, not just the signature of a spouse, seems to transform the ECOA from an 'equal credit' act into a 'fair credit' statute." *Baybank*, 694 N.E.2d at 858 (emphasis in original). The *Baybank* Court considered the regulation a prohibition on "over-securing loans" because a creditor may have sought additional guarantors of a loan for no discriminatory reason at all. *Id.* Though the court "doubt[ed]" whether the Federal Reserve Board had the "authority to extend Regulation B to cast such a broad net," it did not reach the question. *Id.* None of the parties had briefed or argued the proposition, and the Court relied on a "less drastic" basis to decide the appeal, finding that the mother of the borrower, under the circumstances, was a "joint applicant" for credit. *Id.*

Stated simply, even if the Seventh Circuit had based its ruling on the authority of the Board to expand the definition of "applicant," there would still be no conflict. None of the cases cited by the Camps made any ruling or holding on the authority of the Board to expand the definition of "applicant"

under the ECOA and create a new private right of action in favor of guarantors. In other words, the Seventh Circuit's statements have nothing to "conflict with."

Moreover, if any conflict could be said to exist, it is inchoate and indistinct. So far, only one circuit court of appeals (the Seventh Circuit) has expressed doubts about the Federal Reserve Board's expansion of an ECOA private right of action for guarantors; none of them has issued a holding on the matter. Over time, circuit courts of appeal may rule on the authority of the Federal Reserve Board's action. Those rulings could very possibly reach a consensus instead of creating a conflict. Given that possibility and the need for development in the law, expenditure of this Court's scarce resources now would be premature.

Review by this Court would be untimely for another reason. The Seventh Circuit's doubts about the Federal Reserve Board's grant of an ECOA private right of action for guarantors may well prompt Congress to re-examine the ECOA and Regulation B. *See Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Burger, J., concurring) ("Courts are not the forum in which this tangled web ought to be unsnarled. . . . [C]ongressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time that Congress acted to solve the problem.") If the Federal Reserve Board has opened "vistas of liability that the Congress that enacted the Act would have been unlikely to accept,"[6] then Congress should have an opportunity to consider these observations before the this Court applies its energies and time to this issue.

---

[6] Petition, at 10a: *Moran*, 476 F.3d at 441.

**2. The Seventh Circuit correctly determined that SAL committed no "credit discrimination" against Susan Camp.**

The Camps argue in the alternative that the Seventh Circuit's determination that Susan Camp suffered no discrimination "conflicts with the definition of 'discrimination' as defined by 12 C.F.R. § 202.7(d) and as interpreted by the Fourth Circuit Court of Appeals in *Riggs National Bank of Washington, D.C. v. L[i]nch*, 36 F.3d 370 (4th Cir. 1994)."[7] The Camps do not explain how the Seventh Circuit's decision "conflicts with the definition" of discrimination in § 202.7(d). Their argument is undeveloped and unsupported by any cited case law, and it should be rejected.

What the Camps are actually arguing is that the Seventh Circuit misapplied the regulation to the specific set of facts under review. Even if this were true (and it is not), this type of argument "rarely" merits U.S. Supreme Court review. Sup. Ct. R. 10. The Camps request this Court to correct a perceived error that is grounded in the evaluation of the particular facts of this case—a case described by the Seventh Circuit as "a complicated diversity suit."[8] This Court, however, does not sit as an error-correcting court. *Halbert v. Michigan*, 545 U.S. 605, 611 (2005); *Boag v. MacDougall*, 454 U.S. 364, 367-68 (1982) (Rehnquist, J., dissenting) ("In our zeal to provide 'equal justice under law,' we must never forget that this Court is not a forum for the correction of errors.").

---

[7] Petition, at 8.

[8] Petition, at 2a: *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*, 476 F.3d 436 (7th Cir. 2007).

Further, contrary to the Camps' assertion, the opinion below is not in conflict with *Riggs National Bank*. In *Riggs*, Samuel Linch submitted a personal financial statement to a bank that included substantial assets owned jointly with his wife Marcia, a fact which he did not disclose. 36 F.3d at 371. Before closing, however, the bank learned that many of the assets were jointly owned and required that Marcia execute a personal guaranty. *Id.* at 372. According to the Fourth Circuit, the "determinative factual issue was whether Riggs [the bank] had made a determination that Samuel Linch was not independently creditworthy for the requested loan before it required that Marcia also be a personal guarantor of the loan." *Id.* at 374.

Here, contrary to the Camps' assertion (Petition, at 11), the "title" of the financial statement was not "Roger VS Camp." The document was simply titled "Financial Statement." (Appellant's App. 125-27.) The document was much more than Roger Camp's financial statement, it was the financial statement of both Roger and Susan. Roger Camp admitted at trial that "a substantial number of the assets" on the Financial Statement "were owned solely or partly by Mrs. Camp." (Supp. App. 10.) In fact, of the $6.7 million of assets listed on the Financial Statement, over $5.2 million of those assets were owned jointly or exclusively by Susan Camp. (App. 125-27; Supp. App. 4-10.)[9]

Roger did not dispute that the Financial Statement "was, perhaps, a little misleading" (Supp. App. 11); nevertheless he claimed that he did not intend to mislead SAL into thinking

---

[9] A complete list of the assets on the Financial Statement which were solely or jointly owned by Susan Camp can be found in the Statement of the Case, *supra*.

that he alone owned all the assets. (Supp. App. 10.) Roger admitted that the Financial Statement "accurately reflected" both Roger and Susan's "net worth"—"not just" his own. (Supp. App. 5.) Moreover, SAL believed that the assets listed on the financial statement were jointly owned (primarily because the statement included residences). (Supp. App. 16.) The Camps do not dispute this fact.

Given that the Financial Statement submitted by Roger Camp contained a "substantial number of the assets" that were "owned solely or partly by Mrs. Camp" and admittedly reflected both Roger and Susan's "net worth," the Seventh Circuit's decision does not conflict with the *Riggs* case—it parallels it. *Riggs*, 36 F.3d at 371. In *Riggs*, just as happened here, the husband submitted a financial statement with a substantial number of assets owned by his wife. *Id.* In *Riggs*, just as happened here, the creditor became aware that "substantial" assets on the Financial Statement were jointly owned. *Id.* at 372. As a result, irrespective of the existence of a company policy on spousal signatures, SAL reasonably required Susan's guaranty. *See Sw. Pa. Reg'l Council, Inc. v. Gentile*, 776 A.2d 276, 283 (Pa. Super. Ct. 2001) ("[T]he mere existence of a policy to require spousal signatures does not necessarily result in an ECOA violation unless that policy was enforced contrary to the principles of the ECOA."). There is no conflict between *Riggs* and the Seventh Circuit's decision because the record shows neither lender discriminated on the basis of sex or marital status.

### 3. There is no conflict between the Seventh Circuit's decision and any other court on the use of the ECOA as an affirmative defense.

The Camps concede that the Seventh Circuit did not address whether the ECOA can be used as an affirmative defense to void a personal guaranty. (Petition, at 18.) Because the Seventh Circuit determined that SAL did not violate the ECOA in requiring Susan Camp's guaranty, its review of this question was unnecessary. Having suffered no discrimination, Susan could not base an affirmative defense *or* a counterclaim on the ECOA. Thus, if this Court were to accept *certiorari* on this issue, and decide whether an ECOA violation could be raised as an affirmative defense, that decision would have no bearing on Susan Camp's rights and would be purely advisory on an abstract question of law. As this Court has stated, federal courts are "without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am., Div. 998 v. Wis. Employment Relations Bd.*, 340 U.S. 416, 418 (1951). On this basis alone, the Court should deny the Camps' petition.

It was the district court, not the Seventh Circuit, that ruled that Susan Camp could not rely upon the ECOA as an affirmative defense. However, the district court's decision appears in an unpublished, unreported memorandum order. (Petition, at 1.) As such, the district court's decision creates no conflict with any other court on this issue.

More importantly, assuming for the sake of argument that a guarantor has a private right of action under the ECOA, the district court's decision was correct. As between

recoupment and an affirmative defense, the district court rightly concluded that a guarantor's ECOA claim should be considered in the nature of recoupment, not an affirmative defense that entirely voids the guaranty. The weight of federal authority on the subject, the text of Board regulations, this Court's precedent, and simple fairness support the district court's conclusion that the ECOA cannot be used as an affirmative defense.

The district court recognized that the "weight of federal authority" considers a guarantor's ECOA claim as a counterclaim and not an affirmative defense. (Petition, at 43a: district court's April 26, 2002 Memorandum and Order, hereinafter "April 26, 2002 Order"). At least one federal circuit court of appeals has determined that a guarantor's claim of an ECOA violation can be brought within the "recoupment doctrine." *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999); *Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 677 (1st Cir. 1999). Recoupment reduces or eliminates damages; it does not provide any other form of relief. *Bolduc*, 167 F.3d at 672 n.4; *see also Mayes*, 167 F.3d at 677. Recoupment is a common law doctrine that "has largely been superseded by the counterclaim provisions of the Federal Rules of Civil Procedure." *Mayes*, 167 F.3d at 677. At least seven other published federal decisions have also concluded that a guarantor's ECOA claim presents a counterclaim, not an affirmative defense.[10]

---

[10] *FDIC v. 32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1480-81 (D. Kan. 1995); *FDIC v. Skotzke*, 881 F. Supp. 364, 368 (S.D. Ind. 1994); *Resolution Trust Corp. v. Schonacher*, 844 F. Supp. 689, 695-96 (D. Kan. 1994); *Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D. Va. 1993), *aff'd*, 36 F.3d 370 (4th Cir. 1994); *CMF Va. Land v. Brinson*, 806 F. Supp. 90, 95 (E.D. Va. 1992); *Diamond v. Union Bank & Trust*, 776 F. Supp. 542, 544 (N.D. Okla. 1991).

There are good reasons why many courts have not permitted a guarantor to assert an ECOA violation as an affirmative defense. First, Congress designed the ECOA's private right of action to allow an "applicant" who is *denied* credit as a result of discrimination to seek actual damages for the denial. The ECOA contains no text which would indicate that Congress intended such rights to extend to guarantors when credit was *granted*. As the district court noted, the ECOA's private right of action is "a sword, not a shield." (Petition, at 44a: April 26, 2002 Order). Furthermore, the statutory term "'[u]pon application by an aggrieved applicant,'" suggests a civil action initiated by the applicant, not an affirmative defense that vitiates the underlying credit obligation. (Petition at 45a: April 26, 2002 Order (alteration in original) (quoting 15 U.S.C. § 1691e(c))).

The district court examined the Board's regulations for an indication as to the intent of the Board when it extended ECOA claim rights to guarantors, but could find no evidence that the Board intended that right to be in the form of an affirmative defense. Finding no support for an affirmative defense in the statutory text, the legislative purpose and history, or the regulatory process, the district court properly abided by this Court's admonition that "[c]aution must temper judicial creativity in the face of legislative and regulatory silence." (Petition, at 46a: April 26, 2002 Order (quoting *S. Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982))). When "comprehensive regulation" is at issue, agency silence on the availability of an affirmative defense "must be deemed significant." *S. Pac. Transp.*, 456 U.S. at 345.[11] If the Board

[11] In *Southern Pacific*, this Court held that: (1) absence of an affirmative-defense provision in Interstate Commerce Commission's "credit regulations," (2) legislative and administrative history of the credit regulations, and (3) public policy concerns "disfavor[ed] judicial implication of affirmative defenses based on carrier violations of the Commission's credit regulations." 456 U.S. at 345, 346, 348, 352.

had intended to create not just a new private right of action in favor of guarantors for actual damages, but an affirmative defense based on a violation of its regulations, it would have done so explicitly.

Finally, the conclusion that the Board's ECOA regulations do not grant a guarantor an affirmative defense is supported by the drastic and draconian result of such an interpretation: the effective cancellation of a multi-million dollar debt. The district court realized that allowing the guarantor an affirmative defense would "never" invalidate the applicant's obligation. (Petition, at 42a: April 26, 2002 Order.) However, in many spousal cases, including this one, the applicant is "judgment proof," and the creditor's only recourse is the spousal guarantor.[12] Invalidating such guaranties would, in effect, cancel the entire debt, as is the case here.

The ECOA was not intended to promote debt repudiation. Its purpose was and remains to require equal access to credit by creditworthy individuals. The district court's decision that claims under the ECOA were never intended to be used as an affirmative defense to eliminate debt was correct.

---

[12] This of course explains why spousal guaranties are often requested before credit is extended, especially when the creditworthiness of the applicant is based upon assets owned solely or jointly by the applicant's spouse.

**4. Susan Camp had no private right of action under the ECOA to assert either a counterclaim for recoupment or an affirmative defense.**

The district court's decision regarding the nature of a spousal guarantor's ECOA claim (i.e., counterclaim for recoupment rather than affirmative defense) assumed the validity of the Board's extension of the term "applicant" to spousal guarantors, and the creation of a new private right of action in favor of such guarantors. (Petition, at 41a: April 26, 2002 Order.) Because the ECOA confers no private right of action to spousal guarantors, no distinction between recoupment and an affirmative defense was necessary. The Seventh Circuit's doubts about the Board's authority to extend ECOA claims to spousal guarantors were well-founded.

Congress enacted the ECOA in 1974 to end creditor discrimination against women who were independently creditworthy. Courts have recognized that "one, perhaps even the main, purpose of the ECOA was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit." *Capitol Indem. Corp. v. Aulakh*, 313 F.3d 200, 202 (4th Cir. 2002). To that end, the ECOA forbids discrimination that "materially affects an applicant's ability to *obtain the desired credit*." *Haynie v. Veneman*, 272 F. Supp. 2d 10, 19 (D.D.C. 2003) (emphasis added). To ensure equal access to credit, the ECOA requires creditors to provide reasons for adverse actions on credit applications, delegates regulatory and enforcement authority to the Board, pre-empts discriminatory state laws, and establishes a private right of action for applicants who are denied credit because of unlawful discrimination. 15 U.S.C.A. §§ 1691, 1691b, 1691c, 1691d, 1691e (West 1998).

However, only an "aggrieved applicant" can avail herself of the ECOA's private right of action: "Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to *the aggrieved applicant* for any actual damages *sustained by such applicant* . . . ." 15 U.S.C.A. § 1691e (emphasis added). Congress defined an "applicant" as:

> any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C.A. § 1691a(b) (West 1998). Congress did *not* include a guarantor within the definition of "applicant."

Under the ECOA, Congress granted a cause of action only to aggrieved applicants who sought but were denied credit, and suffered discrimination during the application process. Initially, the Board adhered to the text of § 1691a(b) and defined "applicant" in Regulation B (the Federal Reserve Board's set of regulations prescribed under the ECOA) to expressly *exclude* a "guarantor":

> "Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit *other than* a guarantor, surety, endorser, or similar party."

12 C.F.R. § 202.2(e) (1985) (emphasis added), *quoted in Baybank v. Bornhofft*, 694 N.E.2d 854, 856 (Mass. 1998); *see also Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994) (citing the original version of 12 C.F.R. § 202.2(e), which defines "applicant").

In 1985, the Board took the opposite approach and revised Regulation B to *include* "guarantors, sureties, endorsers, and similar parties" in the definition of "applicant." In doing so, the Board improperly expanded Congress's definition and granted "applicant" status to spousal guarantors who are not seeking or applying for credit themselves. In commentary explaining its 1985 revisions, the Board announced: "The revised definition of applicant gives legal standing to guarantors and like parties (enabling them to sue for violations of the regulation's signature rules) but imposes no new requirements on creditors." Revision of Regulation B, 50 Fed. Reg. 48018, 48018 (Nov. 20, 1985). The Board recognized that it was expanding the reach of the ECOA beyond the clear limitations established by Congress:

> The principal effect of the change is to give guarantors and similar parties standing to seek legal remedies when a violation occurs under § 202.7(d). The regulation prohibits creditors, in certain situations, from requiring the signature of an applicant's spouse as a guarantor, surety, cosigner, or similar party. If a creditor violates this provision, however, *a guarantor whose signature has been illegally required currently has no legal remedy because section 706 of the act confers standing to sue only upon an "aggrieved applicant."* The Board has included guarantors and similar parties within the definition of "applicant" to resolve this question of standing.

Revision to Regulation B, 50 Fed. Reg. 48018, 48020 (Nov. 20, 1985) (emphasis added). Thus, the Board expressly stated that Congress had not granted a private right of action to spousal guarantors, and decided that it would do so on its own authority. *Id.*

There are two fundamental problems with the Board's action. First, Congress had already specifically defined an "aggrieved applicant" and had established the limits of the private right of action it had created in the ECOA. The Board's regulation, however, would extend this private right of action to *non*-applicants, such as guarantors like Susan Camp, even though there is no indication that Congress ever intended for non-applicants to enforce ECOA claims. The Board need not have done so. This is not a case of congressional silence in need of agency gap-filling or one of statutory ambiguity in need of agency interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Federal Reserve Board itself recognized that § 1691e granted standing "only" to aggrieved applicants. Thus, the Board effectively overruled Congress's decision to limit the scope of persons permitted to bring a private action under the ECOA. The Board's grant of standing to non-applicant guarantors is, therefore, invalid and unenforceable. Because Susan Camp was merely a guarantor, she was not denied credit by SAL and she was not discriminated against by SAL. Therefore, she is not an "aggrieved applicant" and has no private right of action under the ECOA.

The second fundamental problem with the Board's action is that it results in an unreasonable construction of the ECOA. *See Chevron*, 467 U.S. at 842-843. Textually, the ECOA makes clear that an applicant "applies for credit." 15 U.S.C.A. § 1691a(b). To sign a guaranty is not to apply for credit. Susan Camp's signature on the guaranty did not initiate a credit request; it was merely a promise to stand behind credit for which another person applied. She was not an applicant under the ECOA and, therefore, had no private right of action.

The Board's expansion of the ECOA has led to inherent inconsistencies. On the one hand, the Board expanded the definition of "applicant" to grant guarantors a private right of action for violations of § 202.7(d)(1). 12 C.F.R. § 202.2(e). On the other hand, § 202.7(d)(1) specifically *allows* creditors to require the signature of spousal joint applicants on credit instruments:

> [A] creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

12 C.F.R. § 202.7(d)(1) (1997).

Thus, if Susan Camp was an "applicant" because she was a guarantor, one must conclude that she was a "joint applicant" under § 202.7(d)(1), which would permit SAL to require her signature on a credit instrument. However, a staff interpretation of § 202.7(d)(1), insists that "a person whose signature is required by the creditor as a condition for granting the credit requested" (i.e., a guarantor) is *not* a joint applicant. 12 C.F.R. pt. 202, supp. I, para. 7(d)(1) (1997). So, according to the logic of the regulations, Susan Camp is an "applicant" with standing to pursue an ECOA claim but *not* an "applicant" whose signature SAL had the right to require. This illogical outcome directly contradicts Congress's intent that an ECOA private right of action extend only to applicants refused credit because of sex, marital status, or other prohibited basis.

Finally, inconsistencies such as this inevitably allow guarantors to escape debt. The Board's expansion of a private right of action beyond that intended by Congress has spawned significant growth in ECOA litigation. The number of spousal-signature cases "increased dramatically" after the Board expanded the definition of applicant to include guarantors. Mary Dee Pridgen, *Consumer Credit and the Law* § 3:4 (2004). The Board's action, along with application of the ECOA to business loans, has caused "a significant amount of litigation." *Id.* Courts have also noted the increase in ECOA spousal signature cases. *See CMF Va. Land, L.P. v. Brinson*, 806 F. Supp. 90, 96 (E.D. Va. 1992). Use of the ECOA is now "widespread," as husbands and wives assert claims and defenses "not to obtain deserving credit or to remedy past 'discrimination' but as a last-ditch effort to prevent a lender from obtaining a quick entry of judgment against them." Andrew B. Lustigman & Alicia M. Serfaty, *The Equal Credit Opportunity Act as a Defense Against Payment: How Lenders Can Strike Back*, 111 Banking L.J. 444, 444-45 (1994). These litigants corrupt the purpose of the ECOA by targeting the credit obligation instead of credit discrimination. *Id.* There is no indication that Congress intended to effect such a dramatic change in the law or granted the Federal Reserve Board leave to do so.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. WILKINS
*Counsel of Record*
DONALD M. SNEMIS
BRIAN E. BAILEY
ICE MILLER LLP
One American Square
Suite 3100
Indianapolis, IN 46282-0200
(317) 236-2395
(317) 592-4793 fax

*Counsel for Respondent*